Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

CITIZENS FOR CLEAN GOVERNMENT,

Petitioner,

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE,

-and-

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state that provides a generous campaign subsidy dramatically increasing a candidate's capacity to raise campaign funds from the general public by providing each taxpayer with an annual $50 income tax credit for political contributions may, consistent with the First Amendment as construed in *Buckley v. Valeo*, 424 U.S. 1 (1976), impose ceilings on campaign contributions ranging from $300 to $100 per election, when the history and circumstances of the state's elections indicate that candidates will be able to raise sufficient funds for effective advocacy under such a regime.

2. Whether the state's interest in combating the "actuality and appearance of corruption," which, under *Buckley v. Valeo*, justifies limits on campaign contributions:

(a) is confined to a *quid pro quo* arrangement that resembles bribery or connotes a broader structural evil that includes candidates' granting of preferred access and paying heightened attention to the concerns of large campaign contributors; and

(b) is an adjudicative fact that must be proven with evidence that public officials have actually altered the performance of their public duties in return for campaign contributions or may be established by a showing that the appearance of corruption linked to large contributions is not illusory.

3. Whether a state's attempt to cap campaign contributions in the interest of preventing the appearance or reality of corruption should be reviewed under a balancing test that weighs the minimal burden on speech and associational interests against the state's compelling interest in combating the appearance and reality of corruption, especially in a case where the contribution cap is structurally linked to a public subsidy.

4. Whether a state may, consistent with the First Amendment, impose a cap of $200 per year on contributions to political action committees ("PACs") to prevent contributors from using PACs as a vehicle for evading the legal limits on the amounts they can contribute to candidates and where such limits do not prevent PACs from amassing the resources necessary for effective advocacy.

5. Whether a state may, consistent with the Equal Protection Clause, stimulate broader public participation in the electoral process by permitting PACs that collect a large number of very small contributions to contribute more to candidates than PACs funded by fewer individuals making much larger contributions are allowed to contribute to candidates.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, filed June 4, 1998, is reported at 146 F.3d 563. (Appendix A, 1a-22a). This opinion affirmed in part and reversed in part an order of the United States District Court for the Eastern District of Arkansas, dated October 3, 1997, granting in part and denying in part the request of plaintiffs Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committees (hereinafter collectively described as "Associated Industries") for a declaratory judgment and permanent injunction. The district court's opinion is reported at 978 F. Supp. 1211. (Appendix B, 23a-63a).

STATEMENT OF JURISDICTION

The Eighth Circuit's opinion was entered on June 4, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection the laws.

Arkansas Code § 7-6-203

(a)(1) It shall be unlawful for any candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commission of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of one hundred dollars ($100) per election from any person.

(a)(2) It shall be unlawful for any candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commission of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of three hundred dollars ($300) per election from any person.

(b)(1) It shall be unlawful for any person to make a contribution to a candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commission of State Lands, or to any person acting on the candidate's behalf, which in the aggregate, exceeds one hundred dollars ($100) per election.

(b)(2) It shall be unlawful for any person to make a contribution to a candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commission of State Lands, or to any person acting on the candidate's behalf, which in the aggregate, exceeds three hundred dollars ($300) per election.

* * *

(d) However, an organized political party, defined in Arkansas Code 7-1-101(1) and a small donor political action committee may

contribute up to two thousand five hundred dollars ($2500) to each candidate per election.

Arkansas Code § 7-6-201(12)

A "small donor political action committee" means any person who:

(A) Receives contributions from one or more individuals in order to make contributions to candidates;

(B) Does not accept any contribution or cumulative contributions in excess of twenty-five dollars ($25) from any individual in any calendar year; and

(C) Is registered pursuant to Arkansas Code 7-6-215 prior to making contributions to candidates. "Small donor political action committee" shall not include an organized political party, the candidate's own committee, or an exploratory committee.

Arkansas Code § 7-6-222

(a) Pursuant to regulations to be adopted by the Arkansas Department of Finance and Administration, a single credit against individual Arkansas income taxes shall be allowed for money contributions made by the taxpayer in a taxable year to one or more of the following:

(1) A candidate seeking nomination or election to a public office in an election, or to a candidate's campaign committee; or

(2) A small donor political action committee as defined in Arkansas Code 7-6-201; or

(3) An approved political action committee as defined in Arkansas Code 7-1-201; or

(4) An organized political party as defined in Arkansas Code 7-1-101(1).

(b) The credit allowed by subsection (a) of this section shall be the aggregate contributions, not to exceed fifty dollars ($50) on an individual tax return, or the aggregate contributions, not to exceed one hundred dollars ($100) on a joint return.

Arkansas Code § 7-6-201(9)

"Approved political action committee" means any person who:

(A) Receives contributions from one (1) or more persons in order to make contributions to candidates;

(B) Does not accept any contribution or cumulative contributions in excess of two hundred dollars ($200) from any person in any calendar year . . . .

STATEMENT OF THE CASE

In the two decades since this Court's landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), efforts to reform our system of campaign financing have taken one of two traditional paths:

> (a) the imposition of increasingly stringent limits on the size and source of campaign contributions in an attempt to minimize the potential for electoral corruption, real and apparent; or
>
> (b) the provision of public subsidies to candidates in an attempt to enhance political equality without imposing stringent restrictions on campaign contributions.

Experience has taught that each post-*Buckley* path, if taken in isolation, has substantial drawbacks. Stringent limits on political contributions, standing alone, make it more difficult for candidates to raise the funds needed to wage a robust campaign. Moreover, given the First Amendment ban on efforts to limit campaign

expenditures recognized in *Buckley*, an exclusive reliance on limiting campaign contributions necessarily enhances the relative power of extremely wealthy candidates and places enormous pressures on all candidates to cut regulatory corners in an effort to satisfy a virtually unlimited demand for campaign funds. On the other hand, public funding of the campaign process, without meaningful contribution limits, does little to address legitimate concerns about the ability of wealthy contributors to purchase access to candidates and officials.

Arkansas, recognizing the pitfalls inherent in the traditional post-*Buckley* options, has attempted to meld campaign subsidies and contribution limits into an innovative, integrated system of campaign finance regulation that both prevents corruption and enhances political equality, while emphasizing the importance of individual participation. Arkansas provides a generous public campaign subsidy by offering an annual $50 state income tax credit ($100 for joint filers) for political contributions. As a structural *quid pro quo* for the huge subsidy, Arkansas imposes contribution limits of $300 for most statewide races and $100 for other races.[1] By linking a generous campaign subsidy in the form of income tax credits for campaign contributions with restrictions on the size of campaign contributions, Arkansas has avoided the adverse impact on the availability of campaign funds often associated with limits on campaign contributions. In short, the people of Arkansas have found a way to minimize electoral corruption, encourage individual participation, and enhance political equality — without violating the First Amendment ground-rules set forth in *Buckley*.

Unfortunately, in assessing the constitutionality of the Arkansas plan, the Eighth Circuit completely ignored the generous campaign subsidy that is the structural *quid pro quo* for the contribution limits. The Eighth Circuit believed that this Court's decision in *Buckley* left it no choice but to consider the contribution

1. Arkansas imposes no limit on the amounts individuals may spend independently in support of a favored candidate.

ceilings in artificial isolation from the integrally related campaign subsidy and to invalidate the ceilings unless Arkansas produced evidence that campaign contributions marginally larger than the cap had actually caused public officials to alter the performance of their official duties. *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998) (App. 12a).

The panel of the Eighth Circuit below was profoundly mistaken on two levels. First, the court below erroneously believed that *Buckley* requires a myopic, artificially isolated review of an innovative effort to link campaign subsidies with contribution ceilings. Unless corrected, the Eighth Circuit's holding will scuttle important efforts at imaginative campaign finance reform, like the Arkansas plan, that minimize electoral corruption, enhance political equality, respect individual participation, and encourage a generous flow of campaign funds to candidates.

Second, the Eighth Circuit imposed an impossibly stringent burden of justification on Arkansas' decision to adopt a $300 contribution ceiling in most statewide races and a $100 cap in other races. *Russell*, 146 F.3d at 569 (App. 12a). In effect, the court below required Arkansas to prove that contributions marginally in excess of $300 in statewide races had functioned as bribes, causing public officials to alter their official behavior. But it is precisely because *quid pro quo* bribery is so difficult to prove that this Court upheld the $1,000 federal contribution limits at issue in *Buckley* without requiring a showing that individual officials were guilty of criminal acts.

A. Initiated Act I of 1996[2]

In 1996, more than two-thirds of the voters in Arkansas adopted Initiated Act I, an innovative and comprehensive campaign financing statute designed to combat the appearance and reality of corruption in Arkansas politics, while also broadening citizen

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2. Arkansas Initiated Act I of 1996 is reprinted in its entirety at Appendix C, 64a-72a.

participation in the political process and encouraging more candidates to run for office regardless of their financial resources. Act I furthered these goals through the following means:

> *Public Funding*: Act I established a tax credit of up to $50 per person ($100 for joint filers) for political contributions to candidates, PACs, and political parties. Ark. Code Ann. § 7-6-222. This simple device put directly into the hands of Arkansas voters a huge public subsidy to fund political speech. Suddenly, more than one million taxpayers were empowered to direct a total of at least $50 million into political speech at no cost to themselves.
>
> *Lower Limits on Contributions to Candidates*: Act I lowered the contribution limit from $1,000 per election to $300 per election for candidates running for most statewide offices such as governor and lieutenant governor, and to $100 for most other candidates. Ark. Code Ann. § 7-6-203(a)-(b). These variable limits meant, for example, that a candidate for lieutenant governor who faced a primary, a runoff, and a general election, might collect as much as $900 from any person during an election cycle, and that a candidate for the state house of representatives (where the average race costs less than $15,000) might raise as much as $300 from any one person.
>
> *Higher Contribution Limit for Small Donor PACs*: In order to encourage maximum democratic participation by large groups of citizens with common interests, Act I also created a new entity, a broad-based collective called "small donor political action committees." These small donor PACs are prohibited from accepting donations of more than $25 per person per year. In exchange for this limit, these small donor PACS are permitted to give candidates up to $2,500 per election.

> The candidate contributions of other PACs are subject to the same limits as persons. Ark. Code Ann. § 7-6-203(d).

Act I focused its regulatory scheme on creating mechanisms that would increase political speech, while reducing the potential for actual and apparent corruption. It did not limit candidate campaign expenditures, independent expenditures, or party expenditures.[3] Nor did it limit contributions to a political party. Nor is its public subsidy offered in exchange for an agreement to abide by expenditure limits. In short, Act I rejected the option of restricting the financial resources available to campaigns and opted, instead, for an integrated approach that promised to expand the resources available to candidates and other political players, while minimizing corruption and enhancing political equality.

While Act I limited the amounts that the wealthiest contributors could contribute directly to a candidate — and thereby limited the potential for corruption, undue influence, and discriminatory access — it delivered a potentially enormous pool of resources to average citizens, each of whom was granted a costless mechanism for directing public money to the candidates, political parties, and PACs of their choice.

B. Proceedings Below

1. *District Court*

The district court held a seven-day trial, during which it heard evidence relating to the campaign for Act I and the contribution patterns that had prompted it. For example, the district court heard testimony about lucrative fund-raising events held for a state representative by lobbyists who did not live in the representative's district, but who had substantial business before his committee,

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3. Act I left intact the $200 limit on contributions to "approved political action committees" enacted in 1990. Ark. Code Ann. § 7-6-201(9).

and about evidence of contributions from tobacco interests to the sponsor of a bill that favored those interests. The court also heard evidence predicting that candidates would be able to raise sufficient campaign funds under the new law with its tax credits and lower contribution limits.

In assessing the $300 and $100 limits on contributions to candidates, the district court was bound by an earlier ruling of the Eighth Circuit applying strict scrutiny to invalidate Missouri's $300- to $100-per-election-cycle limits. *See Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

After reviewing the evidence, including the low cost of Arkansas races, the sources of contributions to candidates, and the examples of the appearance of corruption, the district court concluded that, with respect to most races subject to the $100 limit,[4] the limit of $1,000 that preceded Act I was "sufficiently large to support a reasonable perception of undue influence." *Russell v. Burris*, 978 F. Supp. 1211, 1221 (E.D. Ark. 1997) (App. 44a).

After finding that the government had proven its interest in preventing the appearance of corruption, the court held that the $100 limit was not "different in kind" from the $1,000 limit approved in *Buckley* because the $100 limit did not "burden the potential for effective political dialogue." *Id.* at 1223 (App. 49a). In support of this holding, the court found it "significant that no officeholder testified that she would be unable to run an effective campaign with the $100 limit." *Id.* at 1224 (App. 50a). The court relied on testimony from experts and officeholders about the low cost of Arkansas elections, showing, for instance, that races for

4. Because of the size of their districts, the court considered the races for Supreme Court and the Court of Appeals different in kind from the other elections subject to the $100 limit and struck the $100 limit as applied to those judicial elections. 978 F. Supp. at 1224. In this petition, except where otherwise indicated, "$100 limit" will be used to refer to all races subject to that limit except for the elections for Supreme Court justice and Court of Appeals judge.

the state house averaged only $7,000 to $16,000 an election cycle and for the state senate averaged $23,000 to $39,000. *Id.* at 1223 (App. 49a). The court also took note of evidence that during two special elections held under Act I the candidates raised, on average, more money than in the elections prior to Act I. *Id.* at 1224 (App. 50a). The court upheld the $100 limit, except as it applied to the races for Supreme Court justice and Court of Appeals judge. *Id.* (App. 51a).

The district court held, however, that the pre-Act I limit of $1,000 was not large enough to appear corrupting in statewide races. *Id.* at 1222 (App. 44a). The district court based this finding primarily on the cost of gubernatorial campaigns — approximately $900,000 per candidate — but did not address the relatively low cost of other statewide races. *Id.* at 1221 (App. 44a). Having found that the state's interest in combating the appearance of corruption was not established, the district court did not consider whether the $300 statewide limits might be constitutionally tolerable because the infusion of public funds into the political process from the newly enacted tax credit would provide an effective alternative to the need to raise campaign funds from large donors.[5]

2. *Court of Appeals*

A panel of the Court of Appeals for the Eighth Circuit concluded that every portion of the integrated plan it reviewed

5. Applying the test of *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) ["*CalMed*"], the district court upheld the differential treatment between generic PACs and small donor PACs, holding that Act I does not place a greater burden on the First Amendment rights of generic PACs because small donor PACs are subject to more burdensome restrictions on the amount and source of contributions they may accept. *Russell*, 978 F. Supp. at 1226-27. Also relying on *CalMed*, the district court upheld the longstanding $200 limit on contributions to PACs as serving to prevent the evasion of the basic contribution limits. *Id.* at 1225. The court noted that under the limit PAC contributions to Arkansas candidates had been "robust" and that PACs had not been prevented from " 'amassing the resources necessary for effective advocacy.' " *Id.* (quoting *Buckley*, 424 U.S. at 21).

was unconstitutional, including, most pertinently, Act I's $300 and $100 limitations on contributions to candidates. *Russell v. Burris*, 143 F.3d 563 (8th Cir. 1998). The court below reasoned that *Buckley* required that contribution limits be subjected to strict scrutiny, rejecting the argument that *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997), requires less exacting scrutiny when, as here, the restrictions on First Amendment expression are not "severe." *Russell*, 143 F.3d at 568 (App. 9a).

The court of appeals held that in the absence of credible evidence of actual corruption, the government is required to prove its compelling interest in alleviating the "appearance of corruption" with evidence showing that a "reasonable person could perceive . . . that such contributions make for undue influence or spawn corruption." *Id.* at 569 (App. 11a). Nevertheless, the court of appeals rejected evidence presented in the district court demonstrating "specific instances in which large contributions had given rise to the appearance of undue influence or corruption" because the state had not proven that any particular recipient of a $1,000 contribution had actually switched a vote or otherwise changed position after receiving the contribution, attempted to hide the contribution from public disclosure, or accepted contributions in excess of the then-legal limit. *Id.* at 570 (App. 13a). Indeed, the court held that even evidence of a "uniform public perception" that certain contribution patterns were corrupt was insufficient to establish the state's interest when, in the court's view, that "uniform perception" was not objectively reasonable. *See id.* at 569 (App. 12a). In short, the court below required nothing short of proof of illegal activity as a precondition to upholding the contribution limits.

Accordingly, the court below held that the state had failed to prove that there "is real or perceived corruption attributable to large political contributions." *Id.* (App. 10a). In effect, the Eighth Circuit found that two-thirds of Arkansas' voters were "unreasonable" to conclude that contributions in excess of the limits they enacted seemed corrupting.

The court of appeals also held that the contribution limits were "too low to allow meaningful participation in protected speech and

association," and found that Act I's limits were "different in kind" from the $1,000 limits upheld in *Buckley*. *Id.* at 570-71. But the court below simply refused to consider whether the huge public subsidy provided by Arkansas would ameliorate the alleged financial effect of lower contribution limits on both candidates and contributors.[6]

REASONS FOR GRANTING THE WRIT

Introduction: Three Unresolved Issues Posed in *Buckley*

Twenty-two years have elapsed since the landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). While this Court has addressed the constitutional questions posed by campaign finance regulations in candidate elections on six occasions in the interim,[7] it has yet to explain three key unresolved issues arising out of *Buckley* that pose particularly difficult problems for the lower courts and for state and local governments seeking to enact campaign finance legislation in compliance with *Buckley*.

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6. The court of appeals also struck the provision for small donor PACs and the $200 annual limit on contributions to any one PAC.

7. *See California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 ceiling on contributions to PACs); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985) (invalidating ceiling on independent expenditures by PACs); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (invalidating ban on independent expenditures on behalf of federal candidates by grassroots, non-profit corporations); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding ban on independent expenditures by corporations in state and local campaigns); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (invalidating ceiling on independent expenditures by political parties during period prior to selection of candidate). The Court has also addressed campaign finance regulation in referendum campaigns on two occasions. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (invalidating ban on independent expenditures by corporations in connection with referendum); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (invalidating $250 contribution limit in connection with referendum).

First, *Buckley* ruled that the size and source of campaign contributions may be limited in an effort to prevent electoral corruption, real and apparent. *Id.* at 19. But the precise standard of review that governs challenges to contribution limits remains a matter of dispute. Some courts, including the Eighth Circuit below, apply classic First Amendment "strict scrutiny." *See, e.g., Russell*, 146 F.3d at 568; *Carver*, 72 F.3d at 638. Others recognize *Buckley*'s holding that limits on campaign contributions only marginally burden First Amendment rights and apply a less exacting standard of review. *See, e.g., Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992). Indeed, the standard of review suggested in *Buckley* is so unpredictable that it has prompted one academic observer to note that it "varies paragraph to paragraph." Steven H. Shiffrin, *The First Amendment, Democracy and Romance* 32 (1990).

The disagreement over the appropriate standard of review turns, in part, on a second unresolved issue generated by the *Buckley* decision — continuing confusion over what the Court meant in *Buckley* when it recognized that the prevention of electoral "corruption," real and apparent, is a compelling governmental interest justifying reasonable limits on the size and source of campaign contributions. *Buckley*, 424 U.S. at 27. Some courts, including the Eighth Circuit below, read the term "corruption" very narrowly to mean *quid pro quo* arrangements that closely resemble bribery or extortion. *See Russell*, 146 F.3d at 570; *Shrink Missouri Gov't PAC v. Adams*, No. 98-2351, 1998 WL 413477, at *1 (8th Cir. July 23, 1998). Other courts, however, implicitly recognize that "corruption" should be read more broadly to include a kind of preferential treatment such as increased access or heightened concern over issues of interest to large contributors. *Cf. Kentucky Right to Life v. Terry*, 108 F.3d 637, 648 (6th Cir.) (approving $1,000 limits without reviewing any evidence of corruption), *cert. denied*, 118 S. Ct. 162 (1997); *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, 1294-95 (E.D. Cal. 1998) (noting that the electorate's concern for corruption need not be accompanied by evidence of bribery).

Finally, as the opinions below demonstrate, lower courts need guidance in assessing the constitutionality of state and local efforts to enhance political equality by using subsidies to limit the effect of concentrations of wealth on the democratic process. In *Buckley*, this Court recognized that the enhancement of political equality was a "legitimate" government interest that justified spending public funds to subsidize the campaign process. 424 U.S. at 93. The *Buckley* Court considered the relationship between campaign subsidies and expenditure limits, holding that otherwise unconstitutional limits on campaign spending could be required as a *quid pro quo* for the voluntary acceptance of a campaign subsidy. *Id.* at 99-100. But, because the issue did not arise in *Buckley*, the Court has never considered the relationship between campaign subsidies and contribution limits.

Lacking explicit guidance from the *Buckley* opinion, the Eighth Circuit below believed itself obliged to ignore the subsidy provided by Arkansas as the structural *quid pro quo* for the contribution limits and reviewed the contribution limits as if they existed in a legal and factual vacuum. But such a myopic approach is inconsistent with *Buckley* itself, which explicitly recognized the constitutional significance of the interplay between subsidy and limitation, and is unnecessarily destructive of the ability of state and local governments to combine subsidies and limitations in an integrated program that limits the corrosive effects of wealth inequality on the democratic process, while assuring that candidates receive the generous flow of funds needed to wage robust campaigns.

I. Unless Reviewed, the Eighth Circuit's Misreading of *Buckley v. Valeo* Will Dramatically Inhibit the Capacity of State and Local Governments to Seek Imaginative Solutions to the Most Important Contemporary Challenge Facing American Democracy — Dealing with the Impact of Significant Wealth Disparities on the Democratic Process.

This case presents the Court with a singular opportunity to resolve the constitutional relationship between the setting of campaign contribution limits and a linked speech-enhancing public subsidy. This Court's guidance in this area is crucial to ongoing efforts by state and local governments to reform their campaign finance systems.

Overwhelming majorities at the state and local levels throughout the United States are struggling to combat the pervasive cynicism engendered by the disproportionate political influence apparently exercised by monied interests in funding our electoral campaigns — a cynicism that some observers believe is at least partially responsible for the alarming decline in electoral participation that resulted, in 1996, in less than half the eligible electorate voting in a presidential election for the first time since 1824.[8] *See, e.g.*, Eliza Newlin Carney, *Opting Out of Politics*, Nat'l Journal, Jan. 17, 1998, at 106; Sen. John McCain, *The Scandal in Our Midst*, Newsweek, Aug. 17, 1998, at 13. Turnouts in state and local races are even lower. Almost invariably, given the options open after *Buckley*, state and local majorities seeking to build confidence in the electoral process have turned to contribution

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8. *See* Barbara Vobejda, *Just Under Half of the Possible Voters Went to the Polls*, Wash. Post, Nov. 7, 1996, at A30. Electoral participation fell below 50% of the eligible electorate in the 1924 presidential election, but only because the massive influx of newly eligible women voters had not yet been fully integrated into the democratic process.

limits as the primary weapon in the arsenal of reform. By 1997, at least 39 states had imposed limits on individual contributions to candidates. Michael J. Malbin & Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 13-20 (1998).

While contribution ceilings curb the potential for corruption and enhance the public's confidence in democracy, these benefits come at a cost. Limiting the ability of candidates to raise funds efficiently through large contributions can diminish candidates' ability to communicate with voters. Moreover, contribution limits inadvertently enhance the political power of extremely wealthy candidates who are free, under *Buckley*, to expend unlimited amounts of their personal fortunes on their campaigns. *Buckley*, 424 U.S. at 54.

In contrast, Arkansas has fashioned an ingenious approach to campaign finance reform that increases the amount of money available to candidates even as it caps the amount that any one individual can give a candidate. Arkansas' approach, if constitutionally permissible, may well be the wave of the future. Increasingly, states and localities are melding campaign subsidies with contribution limits in an integrated plan that both minimizes corruption and increases the availability of campaign funds. *See* Malbin & Gais, *The Day After Reform*, *supra*, at 21-23. If the Eighth Circuit's opinion in this case stands, however, states and localities throughout the United States will abandon the promising approach of linking effective contribution limits with subsidies designed to enhance the availability of funds to candidates. Without further guidance from this Court, innovative reformers, who thus far have been cooking without a constitutional recipe, will be forced to leave the kitchen.

While *Buckley* did not provide clear guidance on how to evaluate an integrated system of campaign finance regulation that couples limits on contributions with extensive subsidies, the *Buckley* decision strongly suggests that the panel of the Eighth Circuit below was simply wrong in ignoring the subsidy half of

the equation when it assessed the constitutionality of the contribution limits. *Buckley* held that limits on campaign contributions do implicate the First Amendment rights of contributors and candidates. 424 U.S. at 21. Because contributions "fuel" candidate speech and allow supporters to signal their support, *Buckley* held that it would be impermissible to impose contribution limits that are unreasonably low — at least where the candidate has no other source of funding. Tellingly, however, the Court made clear that campaign contributions were not "direct" speech, since they merely empowered a third person to speak. *Id.* Moreover, held the *Buckley* Court, reasonable contribution limits amount to "marginal restrictions" on a contributor's First Amendment rights, and are fully justified by the "compelling" government interest in ridding the electoral process of the reality and appearance of corruption. *Id.* at 21-29.

Indeed, despite the First Amendment interests underlying campaign contributions, the *Buckley* Court held that the government could prohibit *all* contributions to a candidate where it couples that ban with public funding. That was exactly the nature of the presidential campaign finance system upheld in *Buckley*; it prohibited any candidate who accepted public funds from accepting a penny from contributors — notwithstanding a would-be contributor's ardent desire to express support with a contribution. *See Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286-87 (S.D.N.Y.) (three-judge panel) (describing and evaluating First Amendment rights of contributors), *aff'd*, 445 U.S. 955 (1980).[9]

If federal law can bar a supporter entirely from contributing to a candidate, so long as the public funding mechanism provides

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9. It is true, of course, that presidential candidates are able to choose whether to accept public funds and the attendant restrictions, but that difference cannot possibly be relevant to the constitutional rights of the *contributors*. A person who wishes to contribute to a presidential candidate has no say as to whether the candidate will accept public funds, so he cannot in any sense be said to have voluntarily accepted the bar on contributing.

sufficient "fuel" for the candidate's communication, then surely Arkansas may take the less restrictive step of merely limiting contributions under similar circumstances. Where, as here, adequate public funds are provided to "fuel" a candidate's campaign, and where persons may "signal" support by making substantial contributions directly to the candidate, or unlimited personal expenditures in support of the candidate, a contributor's legitimate First Amendment interests, as described in *Buckley*, are fully respected. Yet the *Buckley* decision provides confusing instruction on whether there are residual First Amendment interests that should be given constitutional weight when these other interests are satisfied.

At best, the *Buckley* decision leaves unaddressed the important questions of whether a public subsidy scheme that neither caps election spending nor hinders fund-raising, but in fact encourages moderate contributions and participation from voters, would counterbalance any restraints on speech caused by contribution limits. The *Buckley* Court praises public campaign subsidies, when linked with spending and contribution limits, as part of a desirable effort to "use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. The Court goes on to note that the public subsidy system "furthers, not abridges, First Amendment values." *Id.* The *Buckley* Court also recognizes that facilitating communication between the candidate and the public is a valid and important government goal of campaign regulation. *Id.*

Notwithstanding this Court's history of viewing techniques of enhancing speech through a different lens, the Eighth Circuit declined to consider the public subsidy as it evaluated the contribution limits. *Russell*, 146 F.3d at 567 (App. 10a). Instead, the court of appeals applied strict scrutiny to find that the $100 and $300 limits were "too low to allow meaningful participation in speech and association," *id.* at 570, and were not narrowly tailored to address the reality or perception of corruption in Arkansas. The court of appeals' refusal to address the speech and

debate enhancing elements of the tax credit/subsidy cries out for this Court's attention.

II. While Lower Courts are Hopelessly Divided on the Issue of the Proof Required Under *Buckley* to Justify Limits on Campaign Contributions, the Eighth Circuit's Draconian Requirement That the State Prove Actual Corruption is in Direct Conflict with *Buckley* and Would Have the Effect of Invalidating All Existing Limits on Campaign Contributions.

In *Buckley*, this Court described the threshold for proving the sufficiency of a government's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." 424 U.S. at 25. *Buckley* makes clear that the *appearance* of corruption can exist, and can erode confidence in representative government, even when the "coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" has no basis in reality, but is instead "imagined." *Id.* One of the core assumptions underlying *Buckley* is that the appearance of impropriety is "*inherent* in a regime of large individual contributions." *Id.* at 27 (emphasis added); *see also Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (plurality); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990) (state had sufficiently demonstrated a danger of real or apparent corruption caused by corporate political expenditures because "corporate wealth *can* unfairly influence elections") (emphasis added). Indeed, in rejecting an overbreadth challenge to the $1,000 contribution limits for all federal elections, the Court assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29. Also, the Court did not find it significant that much more than $1,000 would be needed to "enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder." *Id.* at 30.

The Eighth Circuit's decision implicitly rejects these basic tenets of the Court's campaign finance jurisprudence by creating a new and impossibly stringent standard of proof for establishing the requisite appearance of corruption. The court of appeals described this new requirement as "objective reasonableness," 146 F.3d at 569, but, in application, the court required proof of actual bribery or extortion in order to support any claim of apparent corruption. *Id.* at 570.

In applying this new and unsupported standard, the court of appeals repeatedly complained of the government's failure to show that any legislator had changed his vote in exchange for campaign contributions, violated the pre-existing contribution limits, or illegally concealed the source of his contributions. *See id.* at 569-70. In other words, the court required evidence of unlawful behavior before it would consider the public's perception of corruption reasonable. Indeed, the court of appeals acknowledged the evidence that "there was a 'uniform' public perception of corruption associated" with one bill and that one lawmaker received substantial contributions from lobbyists who had business before his committee, *id.* at 569, yet found this evidence insufficient to support a public perception of corruption because, in that court's view, it was unreasonable. The court of appeals created a standard of proof that a perception of corruption is "reasonable" only when it is based on actual *quid pro quo* exchanges of money or other clearly unlawful conduct.

The difference is far from semantic, as the Eighth Circuit confirmed just weeks ago, when it enjoined contribution limits of $1,075 — limits that exceed the limits currently in place under federal law. *Shrink Missouri Gov't PAC v. Adams*, No. 98-2351, 1998 WL 413477, at *1 (8th Cir. July 23, 1998). Relying heavily on its opinion in this case, the Eighth Circuit concluded that

> it is likely that the state has failed to show "that a reasonable person could perceive, on the basis of

> the evidence presented at trial, that such contributions make for undue influence or spawn corruption."

Id. (quoting *Russell*, 146 F.3d at 568) (emphasis added). As *Shrink Missouri* demonstrates, under the Eighth Circuit's logic in this case, it will be virtually impossible to prove an appearance of corruption, which would mean the automatic invalidation not only of virtually every contribution limit adopted in the states, but also of the federal limits approved in *Buckley*.

The Eighth Circuit's newly minted "objective reasonableness" test not only obliterates the distinction between the reality and the appearance of corruption, it flies in the face of *Buckley*'s repeated recognition that any showing of perceived corruption that is not merely "illusory" is sufficient. The *Buckley* Court recognized that "the scope of such pernicious practices [could] never reliably be ascertained," and concluded that anecdotal evidence was sufficient to show that "the problem [of corruption] is not an illusory one." *Buckley*, 424 U.S. at 27 & n.28 (describing the "deeply disturbing" examples of large contributions that surfaced after the 1972 presidential election). The Court, in fact, relied on the public awareness of the "opportunities" for abuse without tying it to a requirement of proving that abuse had actually occurred, or was even likely to occur. *Id.* Because such appearances can severely undermine public confidence in representative government, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical.' " *Id.* (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565 n.29 (1973)); *see also id.* at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated.").

The *Buckley* Court recognized that the very possibility of making large contributions triggered an appearance of corruption,

stating that in a "system permitting unlimited financial contributions," the threat to the public's confidence in the system is self-evident. *Id.* at 28.

This Court's recent decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), illustrates the flaw in the Eighth Circuit's analysis. In *NTEU*, this Court addressed whether a ban on honoraria given to lower-level federal employees unconstitutionally restricted the First Amendment rights of those employees. There, the Court required the government to show that the harms allegedly caused by the honoraria were "real, not merely conjectural." *Id.* at 475 (internal quotation omitted). The *NTEU* Court agreed that "Congress could *reasonably assume* that payment of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence." *Id.* at 473 (emphasis added). But the Court refused to extend that assumption to lower-level employees "with negligible power to confer favors on those who might pay to hear them speak or read their articles" in the absence of some greater showing of need. *Id.*

Thus, the *NTEU* Court was prepared to *assume* that honoraria paid to high-level officials would generate an appearance of improper influence, much like the *Buckley* Court's assumption of harm from "large contributions." Indeed, the dissent in *NTEU* would have accorded the government even more deference to find that the ban should continue to apply to all employees. *Id.* at 494 (Rehnquist, C.J., dissenting). Surely, the assumption that financial rewards to high-ranking executive officials would generate the appearance of improper influence is applicable, as well, to substantial campaign contributions to legislators, attorneys general, and governors.

While no other lower court has approached the Draconian standard applied by the Eighth Circuit, in recent years, lower courts have struggled, without success, to apply uniform standards in cases challenging contribution limits. The Sixth Circuit, in stark contrast with the Eighth, for instance, seems to embrace the *Buckley*

presumption that large contributions are corrupting, and upheld limits on individual and corporate contributions to candidates without an analysis of the evidence of actual or perceived corruption. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 646-48 (6th Cir. 1997). On the other hand, a federal district court in California recently grumbled that although in 1989 " 'the boundaries of the notion of the appearance of corruption ha[d] not been fully developed' . . . [L]ittle has happened since then to help clarify the notion." *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282, 1294-95 (E.D. Cal. 1998) (internal citation omitted). The court also reviewed the evidence to note that several bribery convictions and a government investigation of the state legislature indicate, at the least, that the "problem [of corruption] is not illusory," and that, thus, the government had proved its "legitimate interest" in limiting contributions. *Id.* Another court, reviewing contribution limits for a variety of local offices in the District of Columbia, held that "vague or inapposite evidence" of the government's interest in preventing corruption or appearance of corruption might not be sufficient to support limits as low as $50 per election cycle. *National Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270, 281 (D.D.C. 1996), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997) (contribution limits increased in interim).

The confusion in the lower courts is exacerbated by widespread disagreement over the meaning of "corruption" as the term is used in *Buckley*. Is it limited to acts that constitute bribery or extortion? Or, does it encompass serious distortions in the democratic process that afford wealthy contributors unfair influence by granting them preferred access and heightened concern? *See generally* Daniel Hays Lowenstein, *On Campaign Finance Reform: The Root of Evil is Deeply Rooted*, 18 Hofstra L. Rev. 301 (1989) (reviewing the access and influence of contributors); Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comm. 127 (Spring 1997). The deeply unsatisfactory nature of the lower courts' radically varying approaches to efforts to limit campaign contributions cries out for guidance from this Court.

III. The Circuits are Split on the Appropriate Standard of Review for Contribution Limits.

The *Buckley* Court's review of contribution limits begins with the observation that such limits impose "only a marginal restriction upon the contributor's ability engage in free communication," *Buckley*, 424 U.S. at 21, and continues with the holding that the $1,000 limits at issue there "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues," *id.* at 29. After discussing the government's interest in fighting corruption and the limits' "precise focus" on that interest, however, the Court holds that under the "rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms" caused by the contribution limits. *Id.*

Then-Justice Rehnquist has since stated that

> [the] Court in *Buckley v. Valeo*, never suggested that the interest served by the campaign limitation provision was a "compelling one," nor examined the provision to determine whether it was sufficiently tailored to the interest to survive "heightened scrutiny." The Court was satisfied that the provision had only an indirect and minimal effect on the First Amendment interests, as well as a *rational basis*.

Pacific Gas & Elec. Co. v. Public Utilities Comm'n of California, 475 U.S. 1, 29 n.2 (1985) (Rehnquist, J. dissenting) (emphasis added). In *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)

["*CalMed*"], the Court was conflicted about whether *Buckley* applied a different — lower — standard of scrutiny to contribution limits than to spending limits. *Compare CalMed*, 453 U.S. at 196 (plurality) (stating that "speech by proxy," such as contributions, is not "entitled to full First Amendment protection") *with id.*, at 202 (Blackmun, J., concurring) (disagreeing with the plurality's suggestion that contribution limits receive a level of scrutiny less than "rigorous").

Recently, a plurality of this Court went so far as to suggest that a weighing test applies even to the evaluation of the more highly protected spending limits, stating that when considering campaign finance regulations,

> the Court *essentially weigh[s]* the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views *against* a "compelling" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance of corruption.

Colorado Republican Federal Campaign Comm. v. FEC, 518 U.S. 604, 609 (1996) (emphasis added) (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256-63 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493-501 (1985); *CalMed*, 453 U.S. at 193-199; *Buckley*, 424 U.S. at 14-23). Whether this "weighing test" is only a reformulation of strict scrutiny or is a form of "less exacting scrutiny" that takes into account speech accorded "less than full First Amendment protection" continues to divide this Court and confuse lower courts. *Compare Colorado Republican*, 518 U.S. at 640 & n.7 (Thomas, J. dissenting), *with CalMed*, 453 U.S. at 196, *and Buckley*, 424 U.S. at 27 (expressly rejecting requirement that government must use least restrictive means when regulating contribution limits).

The plurality's view in *Colorado Republican* is consistent with the standard of review applied by the Court in other areas of First Amendment jurisprudence. In *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997), the Eighth Circuit applied strict scrutiny to invalidate Minnesota's ban against a single candidate running for office as the nominee of two different parties. This Court reversed, noting that the ban did not impose a "severe burden" on either voters or political parties because adequate alternative methods of pursuing their respective First Amendment interests existed. *Id.* at 1372. In the absence of a "severe burden," the Court subjected the ban to "less exacting review." *Id.; see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying less exacting review to Hawaii's ban on write-in votes because the ban did not severely burden First Amendment rights). Despite *Timmons*, the court below declined even to consider whether the provision of a generous public subsidy provided an adequate alternative means of "fueling" a candidate's speech, rendering the use of strict scrutiny inappropriate.

The court of appeals here insisted that any standard of review more lenient than strict scrutiny was inappropriate in its consideration of the constitutionality of Act I's contribution limits, and declared that the "weighing" analysis in *Colorado Republican* was a mere "restatement or reformulation . . . of the Court's familiar strict scrutiny analysis." *Russell*, 146 F.3d at 568; *see also Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995) (insisting that "strict scrutiny" was the proper standard), *cert. denied*, 518 U.S. 1033 (1996).

Other circuits, even before *Colorado Republican*, recognized that *Buckley* hardly restates "the Court's familiar strict scrutiny analysis." For instance, the Ninth Circuit held that "a somewhat less stringent test than strict scrutiny [applies] to decide the constitutionality of contribution limitations." *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir.) (citing *Buckley*, 424 U.S. at 29; *Massachusetts Citizens for Life*, 479 U.S. at 259-60), *cert. denied*, 505 U.S. 1230

(1992). Other courts have taken the kind of practical "balancing approach" suggested by the *Buckley* Court. *See National Black Police Ass'n v. District of Columbia Bd. of Elections and Ethics*, 924 F. Supp. 270, 274 (D.D.C. 1996) (describing the disagreement over the standard but applying a balancing test even after finding that the contribution limits had a "severe impact" on First Amendment rights), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997).

When the lower courts have reviewed other types of restrictions on contributions, they have also reflected this confusion over the standard. One court called on to review contribution limits that were based on whether the candidate agreed to spending limits and accepted a partial subsidy described a kind of weighing test — the more disproportionate the burden, the more likely the statute will be held unconstitutional. *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 33 (1st Cir. 1993); *see also Driver v. DiStefano*, 914 F. Supp. 797 (D.R.I. 1996) (applying type of weighing test to contribution limits based on the calendar year). Yet, the Wisconsin Supreme Court, purporting to apply *Buckley* to its analysis of a limit on the aggregate amount a candidate could receive from committees, applied strict scrutiny to find the limits constitutional. *Gard v. State Elections Bd.*, 456 N.W. 2d 809 (Wisc. 1990); *see also Vannatta v. Kiesling*, 899 F. Supp. 488 (D. Ore. 1995) (applying strict scrutiny to strike law limiting contributions from out of district), *aff'd*, No. 95-35998, 1998 WL 461920 (9th Cir. Aug. 11, 1998) (affirming judgment but applying "rigorous scrutiny").

The circuit courts, state supreme courts, and other lower courts are, therefore, in disagreement and confusion over whether to apply strict scrutiny, some form of intermediate scrutiny, or a weighing test when they review efforts to impose contribution limits. That disagreement and confusion is only intensified when, as here, the contribution limits are bracketed with a public subsidy, which lessens any burden on First Amendment rights by enhancing candidates' ability to amass resources. Accordingly, this Court

should grant certiorari to clarify and enunciate the proper standard of review in connection with efforts to link contribution ceilings and public subsidies in an effort to prevent electoral corruption, enhance political equality, and encourage individual participation in the democratic process.

IV. This Court Should Consider the Small Donor PAC Provision as Another Way that Act I Enhances Political Participation Without Violating the Fourteenth Amendment.

Along with the tax credit provision, Arkansas' Act I had another creative means of enhancing the political speech and participation of its citizens — the small donor PAC provision. That new law allowed PACs that only receive contributions no larger than $25 to contribute up to $2,500 per election while regular donor PACs were subject to the standard contribution limit for persons. While this Court's decision in *CalMed*, 453 U.S. at 204, makes clear that the state can impose different campaign finance regulations on different types of organizations, it leaves open the question of whether the state is permitted to allow PACs that are subject to much greater regulation to contribute substantially more to individual candidates than the standard, less regulated PACs.

Although this is an open question, the court of appeals' analysis of this issue in striking down the small donor PAC provision is at odds with the analysis in *CalMed*. In evaluating an equal protection challenge to different campaign finance regulations imposed on different types of organizations, *CalMed* instructed courts to consider whether the regulation in question burdened the First Amendment rights of one group more than it burdened the same rights of the other group and, if so, whether the distinction was justified. The court of appeals here applied strict scrutiny, requiring the differential treatment to be narrowly tailored to serving a compelling state interest. *Russell*, 146 F.3d at 572

(App. 17a). Moreover, the court of appeals declined to consider key justifications for the differential treatment of the two types of PACs — that is, that the small donor PACs are less likely to be used as a means of circumventing individual contribution limits and that they enhance democratic participation by involving more citizens in the electoral process.[10] Instead, the court of appeals held that small donor PACs would not combat corruption because they had larger contribution limits than individuals or regular PACs.

Arkansas used the small donor PAC as another device — like the tax credit — to insure that candidates could continue to raise sufficient funds for their campaigns under Act I's lower contribution limits. Additionally, like the tax credit, Arkansas saw the small donor PAC as way to encourage grass roots political involvement. This Court should grant review in order to instruct lower courts on how to evaluate the constitutionality of this innovative campaign financing device.

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10. Similarly, the court of appeals' decision striking down the $200 limit on contributions to the ordinary PACs is intertwined with its decision striking the $100 and $300 limits because the problem that donors might circumvent those limits with PAC contributions recedes when the limit returns to $1,000. Nonetheless, the court of appeals' construction of *CalMed* is flawed. As with Act I's individual contribution limits, the $200 limit on contributions to PACs triggers only minimal First Amendment protection because the donor is free to spend unlimited amounts independently and can continue to give to candidates.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DECIDED JUNE 4, 1998

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellants,

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Citizens for Clean Government, Appellees.

American Civil Liberties Union of Arkansas, James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellants.

Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellees.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

Appendix A

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Tom Alexander, In His Official Capacity as a Member of the Arkansas Ethics Commission; Ben Allen, In His Official Capacity as a Member of the Arkansas Ethics Commission; and Jack Kearney, In His Official Capacity as a Member of the Arkansas Ethics Commission, Appellants, and

Citizens for Clean Government, Intervenor as Defendant.

James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees.

Connecticut, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Missouri, Montana, New Mexico, North Dakota, Utah, and Vermont, Amici Curiae on Behalf of Appellants.

Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Appellees,

v.

Troy Burris, In His Official Capacity as Chairperson of the Arkansas Ethics Commission; Candi Sue Russell, In Her Official Capacity as a Member of the Arkansas Ethics Commission; Marvin Delph, In His Official

Appendix A

Capacity as a Member of the Arkansas Ethics Commission; Rita Looney, In Her Official Capacity as a Member of the Arkansas Ethics Commission; and Norton Wilson, In His Official Capacity as a Member of the Arkansas Ethics Commission, Defendants, and Citizens for Clean Government, Appellant.

James Madison Center for Free Speech, Shrink Missouri Government PAC, and Zev David Fredman, Amici Curiae on Behalf of Appellees.

Nos. 97-3922, 97-4033 and 97-4038

United States Court of Appeals,
Eighth Circuit.

Submitted: April 13, 1998

Decided June 4, 1998

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Before WOLLMAN, BEAM, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

In 1996, the people of Arkansas, by voter initiative, approved a campaign finance reform measure entitled Initiated Act I. Prior to Act I, Arkansas law limited individuals and political action committees to contributions of $1,000 per candidate during each election cycle. Act I reduced the contribution limit to $300 for the offices of governor, lieutenant

governor, secretary of state, treasurer, auditor, attorney general, and commissioner of state lands, see Ark. Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 for all other state public offices, see Ark. Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1).

Act I also created a special category of political action committee (PAC), see Ark. Code Ann. § 7-6-201(9), § 7-6-201(10), known as a small-donor PAC. See Ark. Code Ann. § 7-6-201(12). Under Act I, a small-donor PAC may accept no contribution larger than $25, see Ark. Code Ann. § 7-6-201(12)(B), and it may contribute no more than $2,500 per election to any candidate, see Ark. Code Ann. § 7-6-203(d). Act I authorized as well the creation of a campaign fund-raising entity known as an independent expenditure committee. See Ark. Code Ann. § 7-6-201(14). An independent expenditure committee may, like any person, make unlimited independent expenditures (that is, ones not coordinated with a candidate) to advocate the election or defeat of a clearly identified candidate for office. See Ark. Code Ann. § 7-6-201(13), § 7-6-201(14). Such a committee, however, may accept no more than $500 from any person annually. See Ark. Code Ann. § 7-6-203(k). Finally, Act I authorized local governments to set reasonable limitations on fund-raising for campaigns for local offices. See Ark. Code Ann. § 7-6-224. Ron Russell, Kent Ingram, William Austin, and the Associated Industries of Arkansas Political Action Committee challenged each of these Act I provisions in the district court, as well as a pre-Act I provision limiting contributions to any one PAC to $200 annually, see Ark. Code Ann. § 7-6-201(9)(B).

Following a bench trial, the district court held that the contribution limits of $300 for certain statewide offices and of $100 for state judicial offices were unconstitutional because

they violated the First Amendment's prohibition against limitations on the freedom of speech. See Russell v. Burris, 978 F.Supp. 1211, 1222, 1224, 1229 (E.D. Ark. 1997). The trial court, however, upheld the $100 contribution limit as to all other offices and the $200 contribution limit to PACs. Id. at 1223, 1225, 1229. The trial court also held that the differential treatment for ordinary PACs and small-donor PACs did not violate the Fourteenth Amendment's equal protection clause. Id. at 1227, 1229. The trial court declined to reach the merits on the other two issues, finding that the plaintiffs did not have standing to contest the limit on contributions to independent expenditure committees, id. at 1217, 1229, and that the provision authorizing relevant actions by local governments was not ripe for a constitutional challenge. Id. at 1217-18, 1229.

All parties appeal the rulings unfavorable to their litigating positions. We affirm in part and reverse in part.

I.

Standing is, of course, a threshold issue in every case before a federal court: If a plaintiff lacks standing, he or she cannot invoke the court's jurisdiction. See Boyle v. Anderson, 68 F.3d 1093, 1100 (8th Cir. 1995), cert. denied, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 214 (1996). In order to invoke the jurisdiction of a federal court, one must meet three requirements. First, a plaintiff must have suffered an "injury in fact," and such an injury must be concrete, particularized, and either actual or imminent. Id. at 1100-01. Second, a would-be litigant must make out a causal connection between the alleged injury and the conduct challenged. Id. at 1100. Third, he or she must show that the injury is likely to be redressed by a favorable decision. Id.

Appendix A

The trial court determined that each of the plaintiffs had Article III standing as to all but one of their challenges, see Russell, 978 F. Supp. at 1217, and the defendants do not contest that determination here. The plaintiffs maintain, however, that the trial court erred in finding that they did not have Article III standing to challenge the provisions of Act I relating to independent expenditure committees.

The trial court found that the plaintiffs did not face a credible threat of present or future prosecution with respect to this part of their claim, and thus could show no actual or imminent "injury in fact," because none of them "could think of an independent expenditure committee to which they had contributed in the past or to which they planned to contribute." Id. Indeed, one plaintiff testified, "Well, in all honesty, I'd have to tell you it would take a stretch of my imagination to figure out why I'd want to contribute anything to an independent committee." Another simply testified that he did not know if he would ever contribute to such a committee.

We are mindful that where "plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement." United Food & Commercial Workers International Union v. IBP, Inc., 857 F.2d 422, 428 (8th Cir. 1988). But the plaintiffs have not demonstrated any such intention: They have indicated neither that they would contribute to a specific independent expenditure committee nor that, but for the limitations of Act I, they would form an independent expenditure committee. Standing may not be predicated merely upon a conjectural or hypothetical injury or, as one of the plaintiffs here would have it, upon a stretch of the

imagination. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 564, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). We therefore affirm the trial court's determination that the plaintiffs lacked standing to challenge the provisions relevant to independent expenditure committees.

II.

"Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238, 265, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Government attempts to limit campaign contributions, therefore, are " ' "subject to the closest scrutiny." ' " Carver v. Nixon, 72 F.3d 633, 636 (8th Cir. 1995), cert. denied, 518 U.S. 1033, 116 S. Ct. 2579, 135 L.Ed.2d 1094 (1996), quoting Buckley v. Valeo, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), itself quoting NAACP v. Alabama, 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Under this standard, a significant interference with protected rights of political association may be sustained only when the state demonstrates a compelling interest and means closely drawn to avoid unnecessary abridgement of associational freedoms. Carver, 72 F.3d at 636.

Intervenor (as a defendant) Citizens for Clean Government (CCG) argues that we should apply a more lenient standard of review to the legislation in this case because Act I included not only contribution limits but also a public subsidy scheme. For this proposition, CCG relies upon the Supreme Court's ruling in Buckley that upheld a ban on general election campaign

contributions to, and a limitation on general election campaign expenditures by, a presidential candidate who elected to receive a public subsidy. See Buckley, 424 U.S. at 85-109, 96 S.Ct. 612.

But the Buckley Court was clear that it was the optional nature of the contribution and expenditure limit scheme, not the subsidy, that rendered the scheme constitutionally permissible: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." Id. at 57 n.65, 96 S. Ct. 612. Similarly, we recently upheld a voluntary campaign subsidy and limitation scheme in Minnesota because the scheme "presents candidates with an additional, optional campaign funding choice, the participation in which is voluntary." Rosenstiel v. Rodriguez, 101 F.3d 1544, 1552 (8th Cir. 1996), cert. denied, __ U.S. __, 117 S. Ct. 1820, 137 L.Ed.2d 1028 (1997). It is true that Act I provided a subsidy and limitation scheme, but unlike the schemes upheld in Buckley and Rosenstiel, Act I was imposed upon all candidates: Candidates do not have the power to opt out. We therefore decline this invitation to apply a standard of scrutiny to this case that is different from the one that we adopted in Carver.

CCG argues for a more lenient standard of review on the basis of two recent Supreme Court decisions as well, but neither of these authorities modifies the standard of review appropriate to this case. In Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 609, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (opinion of Breyer, J.), a case involving the application of federal campaign expenditure limits, three justices resorted to what CCG calls a weighing test, rather than strict scrutiny, to decide the case.

See id. at 616, 618, 116 S.Ct. 2309. These justices described their approach as consistent with cases in which the Court "essentially weighed the First Amendment interest in permitting candidates (and their supporters) to spend money to advance their political views against a 'compelling' governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." Id. at 609, 116 S.Ct. 2309. This adjudicatory approach appears to us to be a restatement or reformulation, not a modification, of the Court's familiar strict scrutiny analysis.

We are aware that during the last term, in Timmons v. Twin Cities Area New Party, 520 U.S. 351, 117 S. Ct. 1364, 1370, 137 L.Ed.2d 589 (1997), the Supreme Court upheld an election regulation that barred a political party from choosing as its nominee a candidate already appearing on another party's ballot. The Court held that while regulations "imposing severe burdens on plaintiffs' rights must be narrowly tailored and [must] advance a compelling state interest," lesser burdens "trigger [a] less exacting review." Id. We believe, however, that restrictions on individual contributions to candidates and on candidates' amassing sufficient resources to run for office are more severe than the restrictions at issue in Timmons. Where the regulations impose severe burdens on First Amendment rights, as here, Timmons reiterates the Court's position that strict scrutiny applies.

We must therefore first determine what interest can be sufficiently compelling to permit the state to restrict First Amendment freedoms. The compelling state interest identified in Buckley was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on

candidates' positions and on their actions if elected to office." Buckley, 424 U.S. at 25, 96 S.Ct. 612. The Court reiterated this position five years later, holding that "Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate." Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981) (emphasis omitted). Subsequently, the Court stated flatly that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

Only three years ago, we emphasized in Carver, 72 F.3d at 638-39, that the state may abridge political speech in the form of campaign contributions only to address the reality or perception of undue influence or corruption attributable to large contributions. We turn, then, to a consideration of whether the challenged provisions can pass muster under this standard.

III.

We consider first the provisions of Act I that limited direct contributions to candidates to $300 per election for certain statewide offices, see Ark. Code Ann. § 7-6-203(a), § 7-6-203(b), and to $100 per election for all other state offices, see Ark. Code Ann. § 7-6-203(a)(1), § 7-6-203(b)(1). The defendants must prove first that there is real or perceived undue influence or corruption attributable to large political contributions in Arkansas, and then that these challenged

provisions of Act I are narrowly tailored to address that reality or perception. We find that the defendants failed to carry their burden before the trial court.

We note that our review of the trial court's judgment may involve the review of some of the factual determinations that it made. The Supreme Court has instructed that, in cases involving the First Amendment, appellate courts are to make an independent examination of the whole record to ensure that their judgments do not constitute a forbidden intrusion on the right of free expression. See New York Times Co. v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). But we are also mindful of Fed. R. Civ. P. 52(a), which provides that a trial court's factual findings are typically reviewed for clear error.

To reconcile these two legal propositions, we held last year that, in cases involving the First Amendment, we would review findings of noncritical facts for clear error, but would conduct an independent review of critical facts. See Families Achieving Independence and Respect v. Nebraska Department of Social Services, 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc). Accordingly, in the discussion that follows, we give due deference to the trial court's determination of noncritical facts, while we review independently those facts that we believe to be critical.

We begin with the observation that no defendant provided any credible evidence to the trial court of actual undue influence or corruption stemming from large contributions. We are left, then, to determine whether the defendants proved that a reasonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.

Appendix A

CCG presented proof at trial that was intended to demonstrate specific instances in which large contributions had given rise to the appearance of undue influence or corruption. Much of this proof focused on the introduction in the Arkansas legislature of a bill that would have prohibited local governments from regulating tobacco. The bill's sponsor, State Representative James Dietz, had received as much as $2,700 in contributions the previous year from various sources related to the tobacco industry, such as the Tobacco Institute. Many other supporters of the bill had apparently also received contributions from pro-tobacco sources. An opponent of the bill, State Representative Ted Thomas, testified that there was a "uniform" public perception of corruption associated with the bill's having been introduced and supported by legislators who had received contributions from tobacco interests.

Even assuming that Mr. Thomas was correct that there was a public perception of corruption, we must determine whether that public perception was reasonable, and whether that perception of corruption derived from the magnitude of the contributions to Mr. Dietz and other supporters of the bill. We believe, after an independent review of the facts presented to the trial court, that the defendants did not prove that the perception of corruption to which Mr. Thomas alluded was objectively reasonable. A newspaper article admitted into evidence quoted Mr. Dietz as saying that he supported the preemption measure because he believed that one "ought to have the right to say what goes on inside his building as long as it's legal." That Mr. Dietz received political contributions from those whose interests he tended to support hardly indicates, on its own, any corruption.

The defendants provided no evidence at trial, for instance, that Mr. Dietz changed his position on the tobacco bill due to

an intervening contribution. Nor did the defendants provide evidence that Mr. Dietz sought to conceal his contributions from tobacco-related sources. If it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislatures could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity. That would spell the end to the political right, protected by the First Amendment, to support a candidate of one's choice.

The defendants' objections to Mr. Dietz's activities are also, we believe, essentially unrelated to the size of the individual contributions that he received. The defendants did not provide evidence, such as that produced by the government in Buckley, of multi-million-dollar contributions to Mr. Dietz. Indeed, our review of the evidence presented to the trial court indicates that Mr. Dietz reported no individual contribution larger than $1,000 from any source, tobacco-related or otherwise. We believe that $1,000 is simply not a large enough sum of money to yield, of its own accord and without further evidence, a reasonable perception of undue influence or corruption.

The defendants essentially criticize Mr. Dietz for offering a bill favorable to interests from whom he had already accepted campaign contributions. The difficulty pointed to, then, seems to be the identity of the contributors and their subsequent interest in legislation rather than the size of their contributions. We note that even if Mr. Dietz had received twenty-seven individual contributions of $100 from various tobacco-related sources instead of a few somewhat larger contributions, the defendants could make the same criticism of his activities as they made here. We therefore conclude that the evidence that

the defendants presented regarding the tobacco legislation does not permit a finding of a reasonable perception of corruption or undue influence due to large contributions.

The defendants also produced proof at trial that was related to contributions by lobbyists to State Representative Ode Maddox. In April, 1996, a group of lobbyists held a fund-raiser for Mr. Maddox at the Arkansas Poultry Federation in Little Rock. According to the trial court, at that event Mr. Maddox raised a total of more than $22,000 from various lobbyists, PACs, and corporations. Our independent review of the record shows that Mr. Maddox received no contribution in excess of $1,000 from any single source.

The record does not indicate any change in Mr. Maddox's political behavior following these donations, nor does it indicate that Mr. Maddox sought to conceal his contributions or their sources. Indeed, the defendants did not even demonstrate that Mr. Maddox voted in any particular fashion with respect to any relevant issues following the receipt of these donations. At bottom, the defendants' complaint about Mr. Maddox's contributions is that they came from lobbyists who live outside his district and have business before his committee from time to time. But this complaint is not related to the size of the contributions made to Mr. Maddox, and thus does not satisfy the compelling state interest standard established in Buckley and Carver. We conclude, then, that the evidence that the defendants offered regarding Mr. Maddox's fund-raising practices does not permit a finding of a reasonable perception of corruption or undue influence stemming from large contributions.

The defendants also adduced proof at trial of contributions by "real estate interests" to members of the Little Rock

municipal government. But, again, the defendants' declared interest in regulating these has to do with the identity of the contributor and that contributor's interests rather than with the size of individual contributions. According to records provided to the trial court, no member of the Little Rock municipal government received more than $1,000 from any so-called "real estate interest." The record does not indicate any change in any official's behavior following such contributions, nor did the defendants demonstrate that any official attempted to conceal the source of the contributions. The evidence instead shows that the "real estate interests" contributed to candidates who supported initiatives with which the contributors agreed — that is, the "real estate interests" appear to have chosen well which candidates to support.

We cannot say that this evidence is sufficient to establish that there could be a reasonable perception of corruption or undue influence due to large contributions. The defendants identify, instead, a concern that "real estate interests" gave money to officials of a municipal government, and that those officials then voted on issues relevant to real estate. This concern, as we have said above, is not related specifically to the size of the contributions, and thus is outside the scope of the compelling state interest as defined by Buckley and Carver.

We also believe that the candidate contribution limits set forth in Act I are too low to allow meaningful participation in protected speech and association. See Carver, 72 F.3d at 641-42. In Buckley, 424 U.S. at 20-35, 96 S.Ct. 612, the Supreme Court approved a $1,000 contribution limit as a narrowly tailored means to address the problem of large campaign contributions. As we noted in Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir. 1994), cert. denied, 513 U.S. 1127, 115 S.Ct.

936, 130 L.Ed.2d 881 (1995), inflation has eroded approximately 60 percent of the value of a dollar since 1976. A $1,000 contribution in 1976 would thus be worth about the same as a $2,500 contribution today. We recognize that the contribution limit upheld in Buckley does not constitute a constitutional minimum and that we may not fine-tune the contribution limits established by Act I. See Carver, 72 F.3d at 641. We must, however, invalidate the contribution limitations if they are different in kind from those that Buckley upheld. See id.

The provisions of Act I challenged here limited contributions to a candidate to only $100 or $300, depending upon the office. See Ark. Code Ann. § 7-6-203(a), § 7-6-203(b). The limits prescribed by Act I, then, are (adjusted for inflation) approximately 4 percent or 12 percent, respectively, of the limit upheld in Buckley. In Day, 34 F.3d at 1366, we concluded that a limitation of $100, or 4 percent of the inflation-adjusted limit upheld in Buckley, constituted a difference in kind from the limit upheld in Buckley. In Carver, 72 F.3d at 641-42, we held that contribution limitations of $100 or $300 per election cycle (2 percent or 6 percent, respectively, of the limit approved in Buckley) were "dramatically lower," and thus different in kind, from the limit upheld in Buckley. We believe that the limitations in question here are similarly dramatically lower than, and different in kind from, the limits approved in Buckley, and thus are unconstitutionally low.

We note, finally, that even if there were a compelling state interest to prevent the perception of corruption or undue influence due to any of the various concerns identified here by the defendants — that is, supporting tobacco legislation, accepting contributions from those appearing before or having

interests before one's legislative committee, accepting contributions from supporters outside one's district, or the like — Act I was not narrowly tailored to address them. As we have already noted, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." Massachusetts Citizens for Life, 479 U.S. at 265, 107 S.Ct. 616. Act I, however, is at once both overinclusive and underinclusive, by limiting the free speech of all who would contribute without addressing the specific concerns identified.

IV.

The plaintiffs challenged two provisions relating to the activities of political action committees. The first of these was a provision, enacted in 1990, that prohibited persons from giving more than $200 each year to any one political action committee. See Ark. Code Ann. § 7-6-201(9)(B).

State-enforced limits on contributions to political action committees stifle "not only free political speech, but also free political association," and are reviewed according to a strict scrutiny standard. Day, 34 F.3d at 1365. We must therefore determine whether the defendants demonstrated that the provision was narrowly tailored to address the compelling state interest in avoiding corruption or the appearance of corruption that stems from large contributions.

We hold that this provision, like the provision that we invalidated in Day, is not narrowly tailored to serve a compelling state interest, because the annual limit is so low as to be different in kind from the limit approved in Buckley. See

id. at 1366. In Day, we noted that a $100 limit (in 1994 dollars) for contributions to political action committees was, adjusted for inflation, equal to approximately 4 percent of the contribution limit upheld in Buckley. Id. Thus, a $200 limit (in 1998 dollars) is equal to no more than 8 percent of the contribution limit approved in Buckley. That limit is also less than 5 percent, even before any adjustment for inflation, of the $5,000 limitation on contributions to PACs approved by the Supreme Court in California Medical Association v. Federal Election Commission, 453 U.S. 182, 195-99, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (plurality opinion).

There is also less of a danger of quid pro quo corruption, such as the sort that one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power. Cf. Day, 34 F.3d at 1365. We believe that a $200 limit (in 1998 dollars) will significantly impair the ability of individuals to exercise their political rights. The limit is simply too low to allow for appropriately robust participation in protected political speech and association, and thus violates the protections for free political speech and free association that the First Amendment affords.

The plaintiffs also challenged the provision in Act I that permitted small-donor political action committees to give as much as $2,500 to a candidate (in contrast to the lower limits applicable to contributions by ordinary political action committees). See Ark. Code Ann. § 7-6-203(d); see also Ark. Code Ann. § 7-6-201(a), § 7-6-201(b). We believe that such differential treatment must be evaluated according to a strict scrutiny standard. "Because the right to engage in political expression is fundamental to our constitutional system, statutory

classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

The defendants argue that the differential treatment of ordinary and small-donor PACs is justified because of the difference in regulations as to their method of raising money. The only compelling government interest that might permit this infringement of First Amendment rights, as we have said, is preventing the reality or perception of undue influence or corruption that might arise from large contributions. As the Supreme Court has held, "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." Buckley, 424 U.S. at 26, 96 S.Ct. 612. Ostensibly to alleviate this potential for corruption, Act I limited individuals and ordinary PACs to giving $300 to certain candidates and $100 to others (although we note that our holding above returns these limits to their pre-Act I limits of $1,000). See Ark. Code Ann. § 7-6-201(a), § 7-6-201(b). Act I allowed small-donor PACs, however, to give $2,500 to any candidate. See Ark. Code Ann. § 7-6-203(d). This differential treatment is said to be acceptable because small-donor PACs themselves receive that money in contributions of $25 or less, see Ark. Code Ann. § 7-6-201(12)(B).

This explanation, however, is manifestly flawed, because it focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. Because a small-donor PAC receives small donations, it is true that it is unlikely that any one contributor to a small-donor

PAC will be able to control that PAC. Act I, however, ignored the possibility that the small-donor PAC itself will seek to control a given candidate. A $2,500 contribution would be even more likely to exacerbate this difficulty than the $1,000 contribution limit applicable to most other contributors. Indeed, if any contribution is likely to give rise to a reasonable perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute. The small-donor PAC provision is not, then, narrowly tailored to serve the compelling government interest of combating the reality or perception of undue influence or corruption.

We reject the defendants' argument that the plaintiffs (namely, three individuals and a political action committee) may not assert this equal protection argument because they are not burdened to a greater extent by this provision than small-donor PACs are. Ordinary PACs may, it is true, raise more money per contribution than a small-donor PAC, but the issue is their ability to speak freely by contributing money to candidates for office. Insofar as that freedom is at issue, the ordinary PACs are burdened more than the small-donor PACs, because ordinary PACs may donate only the amount that individuals may donate, while small-donor PACs may donate $2,500. We believe, then, that the plaintiffs here meet the requirements set forth in California Medical Association, 453 U.S. at 200, 101 S.Ct. 2712.

V.

The plaintiffs also challenged the constitutionality of Ark. Code Ann. § 7-6-224. This provision states only that local governments "shall have the authority to establish reasonable

limitations" on campaign contributions and expenditures, and appears to be simply an allocation by the state of Arkansas of certain of its plenary powers to local governments: It does not set any specific limits on campaign contributions or expenditures, and thus cannot restrict the First Amendment freedoms of any person or entity seeking to contribute to or spend the revenues of a political campaign. Were a local government to exercise the power granted it by § 7-6-224, its action might then be challenged in the same manner as the actions of the defendants were challenged in this suit. But no such action has yet been taken and brought to the attention of a court. Ark. Code Ann. § 7-6-224 thus does not present a federal constitutional controversy that is ripe for adjudication at this time.

VI.

Those provisions of the Arkansas statutes in conflict with our analysis above are unconstitutional and unenforceable. We must now determine whether the invalid provisions of Act I may be severed from the remainder of its provisions.

Severability is a matter of state law. Leavitt v. Jane L., 518 U.S. 137, 139, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996) (per curiam). The Supreme Court of Arkansas looks to two considerations to determine severability: "(1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349, 357 (Ark. 1994). The court provided further guidance, moreover, in its observation that "it is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was

rejected." Id. at 358. A severability clause, such as the one provided in Act I, is relevant but not determinative of whether individual provisions of the act will be considered severable. Id.

Applying the principles set forth in U.S. Term Limits, we find no single purpose behind Act I with which our ruling could interfere. Act I provided for a series of campaign finance reforms, including the independent expenditure committee and certain tax provisions, that remain unaffected by the outcome of this case. We can find no reason not to honor the intent of the drafters of Act I that, to the extent possible, its various provisions should stand on their own.

VII.

We therefore affirm in part and reverse in part the judgment of the trial court. We remand the case to the district court for the entry of declaratory and injunctive relief consistent with this opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS DATED OCTOBER 3, 1997

Ron RUSSELL, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee, Plaintiffs,

v.

Troy BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission, and Candi Sue Russell, Marvin Delph, Rita Looney, and Norton Wilson, in their official capacities as members of the Arkansas Ethics Commission, Defendants,

and

Citizens for Clean Government, Defendant-Intervenor.

No. LR-C-97-0089.

United States District Court,
E.D. Arkansas.

Oct. 3, 1997.

* * *

MEMORANDUM & ORDER

WILSON, District Judge.

The plaintiffs seek a declaratory judgment that Arkansas Initiated Act I of 1996 (Act I) violates their First Amendment

rights to freedom of political speech and association,[1] and their Fourteenth Amendment right of equal protection of the laws. They seek to enjoin the enforcement of both Act I and Arkansas Code 7-6-201(9)(B), a law that pre-dated Act I. The plaintiffs' motion is granted in part and denied in part:

A. Enforcement of Arkansas Code section 7-6-203(a)(2) and (b)(2), which imposes a $300 per election contribution limit applicable to enumerated statewide offices, is enjoined.

B. Arkansas Code section 7-6-203(a)(1) and (b)(1), which imposes a $100 per election contribution limit applicable to all other offices, is upheld, except as to the offices of Supreme Court Justice and Court of Appeals Judge. Application of this section to the offices of Supreme Court Justice and Court of Appeals Judge, is enjoined.

C. Arkansas Code section 7-6-201(9)(B), which imposes a $200 per year limit on contributions to approved political action committees, is upheld.

D. Arkansas Code sections 7-6-201 and -203(d), pertaining to small donor political action committees, are upheld against the plaintiffs' challenge on equal protection grounds.

E. The plaintiffs lack standing to challenge Arkansas Code sections 7-6-201(13) and (14), and 7-6-203(k), which

1. First Amendment protections are made applicable to the states by the Fourteenth Amendment. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 n. 1, 115 S.Ct. 1511, 1514 n. 1, 131 L.Ed.2d 426 (1995).

address contributions to an independent expenditure committee.

F. The plaintiffs' challenge to Arkansas Code section 7-6-224, concerning the authority of local jurisdictions to enact more restrictive campaign contribution regulations than state law, is dismissed because it is not ripe.

I. Background

A. Act I

Act I, which amended Arkansas' existing campaign contribution laws, was approved by voters on November 5, 1996, by a two-to-one margin. Before Act I, a candidate could receive up to $1000 in contributions per election from individuals, corporations, unions, political action committees (PACs) and other groups. Ark.Code Ann. §§ 7-6-201(1), -203(a) (Michie Supp.1995). In addition, a state political party could contribute up to $2500 per election to that party's candidate. Id. § 7-6-203(d). Since 1990, approved PACs have been limited to contributions of no more than $200 per year from any person. Id. § 7-6-201(9). While not established by Act I, this limitation is attacked by the plaintiffs in this action.

Act I made substantial changes to Arkansas' campaign contribution law. Under the Act I amendments, candidates for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, Attorney General, and Commissioner of State Lands ("statewide candidates") may not accept campaign contributions exceeding $300 per election from any person.[2] Candidates for all other offices, including

2. Section 2 of Act I states in part:

(Cont'd)

Appendix B

Arkansas Supreme Court Justices and Court of Appeals Judges, are limited to contributions of no more than $100 per election from any person.[3] Although state Supreme Court Justices run

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(Cont'd)

Arkansas Code 7-6-203(a) [and] (b) ... are hereby amended to read as follows:

. . . . .

(a)(2) It shall be unlawful for any candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of three hundred dollars ($300) per election from any person.

. . . . .

(b)(2) It shall be unlawful for any person to make a contribution to a candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds three hundred dollars ($300) per election.

3. Section 2 of Act I provides in part:

Arkansas Code 7-6-203(a) [and] (b) . . . are hereby amended to read as follows:

(a)(1) It shall be unlawful for any candidate for any public office, except the office of Governor, Lieutenant Governor,

(Cont'd)

statewide, they are not included in the category of "statewide candidates" under the Act I limitations. Arkansas Court of Appeals Judges are elected from districts of approximately 400,000 persons. By way of comparison, Arkansas Senate districts include approximately 68,000 persons; Arkansas House of Representative districts include a population of approximately 24,000.

Act I did not disturb the right of political parties to contribute up to $2500 to a candidate per election,[4] and it creates

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(Cont'd)

> Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of one hundred dollars ($100) per election from any person.
>
> . . . . .
>
> (b)(1) It shall be unlawful for any person to make a contribution to a candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds one hundred dollars ($100) per election.
>
> . . . . .

4. Section 2 of Act I requires in part:

> Arkansas Code 7-6-203 . . . (d) [is] hereby amended to read as follows:

(Cont'd)

a small donor PAC subject to the same $2500 limit.[5] Neither did the Act alter the definition of "persons," which remains: "any individual, proprietorship, firm, partnership, joint venture, syndicate, labor union, business trust, company, corporation, association, committee, or any other organization or group of persons acting in concert. It shall also include organized political parties. . . ." Id. § 7-6-201(1). Because approved PACs are persons by definition, Act I limits their contributions to statewide candidates to $300 per election and contributions to other candidates to $100 per election. Act I also limits aggregate contributions by any person to independent expenditure

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(Cont'd)

> (d) However, an organized political party as defined in Arkansas Code 7- 1-101(1) and a small donor political action committee may contribute up to two thousand five hundred dollars ($2500) to each candidate per election.

5. Section 1 of Act I requires in part:

> Arkansas Code 7-6-201 is hereby amended to add the following new subdivision[ ]:
>
> 12) A "small donor political action committee" means any person who: (A) Receives contributions from one or more individuals in order to make contributions to candidates; (B) Does not accept any contribution or cumulative contributions in excess of twenty-five dollars ($25) from any individual in any calender year; and (C) Is registered pursuant to Arkansas Code 7-6-215 prior to making contributions to candidates. "Small donor political action committee" shall not include an organized political party, the candidate's own committee, or an exploratory committee.

committees[6] to $500 per calendar year.[7] Introducing a public subsidy element, Act I provides for state tax credits for

6. Section I of Act I provides in part:

> Arkansas Code 7-6-201 is hereby amended to add the following new subdivisions:
>
> . . . . .
>
> (13) An independent expenditure is any expenditure which is not a contribution and: (A) expressly advocates the election or defeat of a clearly identified candidate for office; and (B) is made without arrangement, cooperation, or consultation between any candidate, or any authorized committee or agent of such candidate, and the person making the expenditure or any authorized agent of that person; and (C) is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of the candidate.
>
> (14) "Independent expenditure committee" means any person who receives contributions from one or more persons in order to make an independent expenditure and is registered pursuant to Arkansas Code 7-6-215 prior to making expenditures.

7. Section 3 of Act I declares:

> Arkansas Code 7-6-203 is hereby amended to add the following new subsection:
>
> (k) An Independent expenditure committee may not accept any contribution or cumulative contributions in excess of five hundred dollars ($500) in value from any person in any calendar year.

campaign contributions of $50 per year on an individual return and $100 on a joint return.[8] Additionally, Act I allows

8. Section 10 of Act I provides the following:

> Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:
>
> 7-6-222. Tax Credits for Certain Individual Political Contributions.
>
> (a) Pursuant to regulations to be adopted by the Arkansas Department of Finance and Administration, a single credit against individual Arkansas Income taxes shall be allowed for money contributions made by the taxpayer in a taxable year to one or more of the following:
>
> (1) A candidate seeking nomination or election to a public office at an election, or to the candidate's campaign committee; or
>
> (2) A small donor political action committee as defined in Arkansas Code 7-6-201; or
>
> (3) An approved political action committee as defined in Arkansas Code 7-6-201; or
>
> (4) An organized political party as defined in Arkansas Code 7-1-101(1).
>
> (b) The credit allowed by subsection (a) of this section shall be the aggregate contributions, not to exceed fifty dollars ($50) on an individual tax return, or the aggregate contributions, not to exceed one hundred dollars ($100) on a joint return.

municipalities, counties and townships to set contribution limits lower than those set by state law.[9]

B. The Parties

The plaintiffs are three individuals and a registered Arkansas PAC. Plaintiff Kent Ingram is a businessman, former state senator, and frequent campaign contributor, who had made numerous campaign contributions at levels that would exceed the Act I limits, and who desires to continue to contribute at the higher levels. Plaintiff William R. Austin is a businessman who wishes to contribute in amounts exceeding the Act I limits. Plaintiff Ron Russell is the Executive Vice-President of the Arkansas Chamber of Commerce, a former mayor, and campaign contributor in amounts that would exceed current Act I limits. Mr. Russell also wishes to contribute at the higher levels. Plaintiff Associated Industries of Arkansas Political Action Committee (AIAPAC) is an approved PAC favoring business interests, that asserts the right to contribute $2500 per election to candidates, just as a small donor PAC may do.

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9. Section 12 of Act I provides:

> Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:
>
> 7-6-224. Authority of Local Jurisdictions Municipalities, counties and townships shall have the authority to establish: reasonable limitations on the time periods candidates for local office shall be allowed to solicit contributions; limits on contributions to local candidates at amounts lower than those set by state law; and voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies.

Plaintiffs Ingram and Russell are officers of the State Chamber PAC. Plaintiffs Austin and Russell are officers of AIAPAC.

The defendants are the individual members of the Arkansas Ethics Commission, sued in their official capacities. The Commission administers Arkansas campaign finance and disclosure laws and investigates alleged violations of these laws. Defendant-Intervenor Citizens for Clean Government (Citizens), is a coalition of organizations including the Association of Community Organizations for Reform Now (ACORN), Common Cause, the New Party, and a local union. Citizens was the principal proponent of Act I.

C. The Issues

The plaintiffs claim that the following provisions of Act I violate their rights to freedom of political expression (speech) and association under the First Amendment: (1) the $100 and $300 limits on campaign contributions to candidates; (2) Act I's authorization for local jurisdictions to set even lower contribution limits; and (3) the $500 limit to annual contributions a person may give to an independent expenditure committee. The plaintiffs challenge, on the same grounds, Arkansas' $200 per person limit on annual contributions to an approved PAC. As noted earlier, this latter limit was approved by a ballot initiative in 1990, and thus pre-dated Act I. The plaintiffs claim further that in allowing small donor PACs to contribute $2500 per election to a candidate, Arkansas denies equal protection of the laws to approved PACs, which are subject to the $100 and $300 individual contribution limits. The defendants and Citizens argue that plaintiffs lack standing to assert these claims.

Appendix B

II. Discussion

A. Standing

This Court's jurisdiction is restricted by the U.S. Constitution, which allows federal courts to hear only "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. The Court cannot render advisory opinions. Whether a plaintiff has standing to invoke the jurisdiction of the federal courts is a threshold question in any case. To establish standing a plaintiff must show: (1) that she suffered an injury in fact — "an invasion of a legally protected interest" that is both "concrete and particularized," and "actual or imminent, not 'conjectural' or 'hypothetical' "; (2) a causal connection between the injury and the challenged action; and (3) that a favorable decision is likely to redress her injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations omitted). When a party brings "a pre-enforcement challenge to a statute that both provides for criminal penalties and abridges First Amendment rights, 'a credible threat of present or future prosecution itself works an injury that is sufficient to confer standing.' " Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129, 131 (8th Cir.1997) (quoting New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir.1996)). The Honorable H. Franklin Waters discusses this precise issue in a case challenging the constitutionality of Act I. Arkansas Right to Life State Political Action Comm. v. Butler, 972 F.Supp. 1187 (W.D.Ark.1997).

In Arkansas Right to Life, the defendants argued that the plaintiffs lacked standing to raise a claim against Defendant Butler, a State Attorney for Benton County, Arkansas. The

defendants contended that there was no real and immediate threat that Butler would prosecute the plaintiffs, because prosecutors had not brought criminal charges for violations of state contribution limits since the limits were enacted in 1975. The court rejected this reasoning, concluding instead that this time span was not sufficient to show that failure to prosecute under the Act was a "deeply embedded way that Arkansas carries out state policy. The fact that Arkansas has recently chosen to address the issue through passage of the Act provides ample grounds for believing that a credible threat of prosecution exists under the Act." Id. at 1192. Finding that the defendants had failed to introduce compelling evidence that the plaintiffs did not face a credible threat of prosecution, Judge Waters concluded. "the Act has been recently enacted, it facially restricts the plaintiffs, and violation of the statute can subject the plaintiffs to criminal prosecution." Id. at 1192.

Here, the plaintiffs testified that they want to contribute more to candidates, PACs, and independent expenditure committees than is allowed by the limits established by Arkansas law as amended by Act I. The defendants and Citizens counter that these assertions are largely speculative and unsupported by the facts. I find that the Act I amendments present a credible threat of present or future prosecution with respect to each of the plaintiffs' claims. Arkansas Right to Life, 972 F.Supp. at 1192. Therefore, the Plaintiffs have standing, except in their challenge to the $500 limit to annual contributions a person may give to an independent expenditure committee. This exception arises because none of the plaintiffs could think of an independent expenditure committee to which they had contributed in the past or to which they planned to contribute, although they stated they may wish someday to contribute to such a committee. The plaintiffs' stated desire to

contribute to independent expenditure committees is too conjectural to support a finding of a credible threat of present or future prosecution. Therefore, on this issue, I find that the plaintiffs lack standing.

B. Ripeness

One other claim fails to meet a threshold requirement. The plaintiffs allege a violation of their First Amendment rights because Act I authorizes local jurisdictions to set even lower contribution limits than the state imposes. This issue is not ripe for consideration, because no local jurisdiction has yet set a lower contribution level. I can "only hypothesize that such an event will come to pass, and it is only on this basis that the constitutional claim could be adjudicated at this time." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 304, 99 S.Ct. 2301, 2312, 60 L.Ed.2d 895 (1979). See Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967).

C. Limits on Contributions

1. Contributions to candidates

Any analysis of the constitutionality of limited contributions to candidates under Act I must begin with Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In Buckley, the Supreme Court upheld as constitutional provisions of the Federal Election Campaign Act of 1971 (FECA) limiting campaign contributions in federal elections. The Court upheld FECA's $1000 per election contribution limit to single candidates by an individual contributor or group, and a $5000 limit to candidates by a political committee. 424 U.S. at 23-24,

35-36, 96 S.Ct. at 637, 642-43. After recognizing that the freedoms of speech and association "lie[ ] at the foundation of a free society," the Court warned that "[n]either the right to associate nor the right to participate in political activities is absolute." Id. at 25, 96 S.Ct. at 637-38 (citations omitted). The Court instructed that these rights may be limited if the limitation is "closely drawn to avoid unnecessary abridgment of associational freedoms" and if the state "demonstrates a sufficiently important interest." Id., at 25, 96 S.Ct. at 637-38.

In a decision directly applicable here, the Eighth Circuit, only two years ago, decided the constitutionality of a Missouri initiative on campaign contribution limits. The court found the initiative's limits too low to pass constitutional muster, in spite of the fact that the initiative passed by a three-fourths majority. Carver v. Nixon, 72 F.3d 633 (8th Cir.1995), cert. denied, __ U.S. __, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996).[10] This Missouri law limited campaign contributions by a person or committee to a candidate or candidate committee to: (1) $100 for candidates in districts with populations of less than 100,000; (2) $200 for non-statewide candidates in districts with a population of 100,000 or more; and (3) $300 for statewide candidates. Id. at 635. Statewide candidates were defined by the Missouri statute as Governor, Lieutenant Governor, Attorney General, Auditor, Treasurer, and Secretary of State. The Missouri limits applied to an "election cycle," defined by Missouri statute as "the period of time from general election for an office until the next general election for the same office." Id. at 635 & n. 3 (citing Mo.Ann.Stat. § 130.100 (Vernon Supp.1995)). An election cycle included both the primary and

10. For a thoughtful discussion of Carver, see William J. Connolly, How Low Can You Go? State Campaign Contribution Limits and the First Amendment, 76 B.U.L.Rev. 483 (1996).

the general election. Id. Thus, a candidate for statewide office in Missouri could receive a total of $300 for both the primary and general elections. Conversely, Arkansas' limit is $300 per election. In Arkansas, a candidate for one of the enumerated statewide races could receive a total of $900, assuming a primary race, a run off, and then a general election.

In Carver, the plaintiff argued, as the plaintiffs do here, that the contribution limits unconstitutionally infringed on his First Amendment rights to political expression and freedom of association. After noting that individual Justices of the U.S. Supreme Court had voiced differing opinions on the level of scrutiny applicable to contribution limits, the Carver court concluded that, "[t]he Court has not ruled that anything other than strict scrutiny applies" in cases involving such limits. Id. at 637.[11] The court thus applied strict scrutiny and required the

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11. In his partial concurrence and dissent in Buckley, Justice White argued that while campaign contributions help produce speech, they are not themselves speech protected by the First Amendment. Justice White reasoned that "[FECA] regulates . . . giving and spending money, acts that have First Amendment significance not because they are themselves communicative with respect to the qualifications of the candidate, but because money may be used to defray the expenses of speaking or otherwise communicating about the merits or demerits of federal candidates for election." 424 U.S. at 259, 96 S.Ct. at 745. Justice White would not have decided the challenge to contribution limits on First Amendment speech grounds. Rather, he saw the issue as one depending on whether the government's nonspeech interests in regulating "the use of money in political campaigns are sufficiently urgent to justify the incidental effects" that limits have on the First Amendment rights of candidates. Id. at 260, 96 S.Ct. at 746. Justice White reiterated this view almost 10 years after Buckley:

The First Amendment protects the right to speak, not the right to spend, and limitations on the amount of money that can be spent are not the

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state to prove that the statute's limitations were "narrowly tailored to meet a compelling state interest." Id. at 638. The court emphasized that when government defends a regulation on speech it must demonstrate that the regulation will "alleviate these harms in a direct and material way." Id. at 644 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664, 114 S.Ct. 2445, 2470, 129 L.Ed.2d 497 (1994) (Kennedy, J., plurality)). Where First Amendment freedom of association concerns are threatened, the court found that, under Buckley, the regulation must be "closely drawn to avoid unnecessary abridgment" of these freedoms. Id. at 644 (quoting Buckley, 424 U.S. at 25, 96 S.Ct. at 637-38).

Addressing the state's compelling interest, the Eighth Circuit declared that the Buckley Court "identified the compelling interest as 'the prevention of corruption and the appearance of corruption spawned by the real or imagined

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same as restrictions on speaking. I agree with the majority that the expenditures in this case "produce" core First Amendment speech. But that is precisely the point: they produce such speech; they are not speech itself. . . . Such a house-that-Jack-built approach could equally be used to find a First Amendment right to a job or to a minimum wage to "produce" the money to "produce" the speech.

FEC v. National Conservative Political Action Comm., 470 U.S. 480, 508, 105 S.Ct. 1459, 1474, 84 L.Ed.2d 455 (1985) (internal citation omitted).

It has been suggested, in jest, that if "spending money in politics is really speech, then the laws against bribery should be unconstitutional." Robert Peck, et al., Constitutional Implications of Campaign Finance Reform, 8 Admin.L.J.Am.U. 161, 186 (1994) (comments of Professor Jamin B. Raskin). I think the point is that limiting campaign contributions should not be equated with limiting protected speech. If I were writing on a clean slate, I might well be persuaded that Justice White's view is correct; but his opinion has remained a minority view.

coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.' " Id. at 638 (quoting Buckley, 424 U.S. at 25, 96 S.Ct. at 638) (emphasis in original).[12] The Eighth Circuit concluded that the district court, which had upheld the Missouri statute as constitutional, had erred in extending Buckley to limit all contributions, not just large ones. Id. at 639. In other words, under the explicit holding in Carver, if $1000 is not large, the analysis ends and the plaintiffs win. This leaves me the difficult task of determining what a "large" contribution is in the context of Arkansas elections.

The Carver court concluded that the district court had posed, but had not answered, the question of whether the Missouri limits were unconstitutionally low. Id. at 640. The court noted that the district court's conclusions extended only to the question of whether the limits were narrowly tailored. Id. ("The fact that [the Missouri initiative] sets forth graduated limits has nothing to do with whether the limits are so low as to be unconstitutional.") Turning once more to Buckley, the court observed that, "[a]lthough we certainly are not free to fine tune the limits established by [the Missouri statutes], and we generally accept the limits established by the legislature, Buckley instructs that we must invalidate that judgment when the 'distinctions in degree' become 'differences in kind.' " Id. at 641 (quoting Buckley, 424 U.S. at 30, 96 S.Ct. at 640). After independently reviewing the facts, the Eighth Circuit held that the contribution limitations did, in fact, amount to a "difference in kind" compared to the $1000 limits upheld in Buckley. Id. at 645. At first blush, it might appear that Carver requires an

12. This portion of Buckley quoted in Carver is actually the Supreme Court's characterization of the parties' definition of the state interest, and was not an explicit holding of the Supreme Court.

out-of-hand ruling for the plaintiffs. However, I believe that a close inspection reveals constitutionally important differences between the Carver case and the claims in this case.

As noted, the Carver court held that the state's compelling interest in burdening political activity protected by the First Amendment was that of limiting "the reality or perception of undue influence and corruption from large contributions." Id. at 639. Prior to the passage of the law challenged in Carver, Missouri had no contribution limits. The court noted two extreme examples of corruption presented at trial: a $420,000 contribution from a corporation's PAC to various local races, and the "Keating Five" scandal. Id. at 642. In finding that the Missouri law was not narrowly- tailored to avoid corruption, the court declared that "[a] $420,000 contribution is a far cry from the [Missouri] limits." Id. In contrast, Arkansas has limited individual contributions to $1000 since 1975,[13] and there was no evidence at trial of campaign contributions exceeding $1000. I believe that the contribution limits in place prior to Act I were intended to address Arkansas' interest in limiting real or perceived undue influence or corruption from extremely "large" contributions, such as the $420,000 contribution mentioned by the Eighth Circuit in Carver, and the $2 million contribution to the 1972 Presidential campaign from dairy interests referred to in Buckley. 424 U.S. at 27 n. 28, 96 S.Ct. at 638 n. 28 (citing the D.C. Circuit's discussion of contribution abuses in the same case, Buckley v. Valeo, 519 F.2d 821, 840 n. 36 (D.C.Cir.1975) (per curiam)). However, I conclude that Arkansas, having initially established contribution limits intended to avoid

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13. The Arkansas Legislature first established a $1000 per election contribution limit in 1975, which it increased to $1500 per election in 1981. In 1990, the voters passed Initiative Measure No. 1, returning the limit to $1000. Ark.Code Ann. § 7-6-203 (historical notes).

corruption associated with large contributions, may subsequently lower the level of such limits, if the limits have not adequately addressed that harm, and the lower limits are not so low as to render them a difference in kind rather than a difference in degree. So, what is "large," and what is "too low"? "Ay, there's the rub."[14]

I find that, at least regarding the non-statewide offices, the defendants and Citizens have shown that Arkansas' campaign contribution laws prior to Act I have not adequately addressed the harm of real or perceived undue influence or corruption arising from large contributions. For example, the defendants and Citizens introduced evidence of an April 1996 fundraiser organized by registered business interest lobbyists for Representative Ode Maddox, the Chairman of the Arkansas General Assembly's House Insurance and Commerce Committee. The event was held at the Arkansas Poultry Federation office in Little Rock. Representative Maddox's district is in the Ouachita Mountains in the western part of the state. None of the contributors resided in Representative Maddox's district, and most if not all of these contributors had lobbied before members of the Insurance and Commerce Committee. Significantly, of the more than $30,000 Representative Maddox raised for his campaign, over $22,000 came from various lobbyists, business related PACs, and corporations, including several contributions of $1000.

I hasten to point out that no evidence of actual undue influence was introduced, and the defendants and Citizens did not contend there was any such evidence. Representative Maddox's uncontradicted testimony was that he had never solicited "a dime" in contributions in any race during his more

14. William Shakespeare, Hamlet, act 3, sc.1, l. 56.

than forty years of service in the Arkansas General Assembly. Furthermore, Representative Maddox testified that he gave all interested parties an equal opportunity to be heard before his committee, regardless of contributions. I credit this testimony. Nonetheless, the question of appearances remains.

Defendants and Citizens introduced evidence concerning the sponsoring of a "tobacco bill" sponsored by State Representative James Dietz. This bill, if enacted, would have kept local governments from passing ordinances regulating tobacco, leaving all such regulation to the state. The evidence reflected that Representative Dietz received contributions totaling $2700 from tobacco interests in one election cycle. The evidence also revealed that tobacco interests had made several contributions to the members of the House Committee who voted for the bill. While Representative Dietz publicly defended this bill on the merits (according to a newspaper article introduced into evidence), it received widespread media attention, and was roundly condemned as "bad," "special interest" legislation. It would be hard to argue that the media, and presumably, therefore, the public, did not in this instance perceive undue influence from "large" contributions.

Citizens also introduced an August 1997 report compiled by ACORN of the 1994 election cycle for the Arkansas House and Senate races. The report examined contributions in excess of $100, and found that special interest group contributions made up seventy percent of the total. After subtracting contributions from non-business related interest groups, the report noted that business related interest groups still accounted for between sixty-two and sixty-five percent of contributions in excess of $100. Defendants' witness Robert Stern testified concerning a study conducted by the Center for Governmental

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Studies that listed campaign contribution patterns over the past three election cycles in Arkansas. Mr. Stern's testimony echoed the findings of the ACORN report. He explained that business interest contributions had provided the major part of campaign contributions.

The evidence presented here convinces me that a "large" contribution depends — at least in part — on its size relative to total campaign expenses. The Supreme Court has instructed that the compelling interest at issue "relates to the perception of undue influence of large contributions to a candidate: '[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative government is undermined. . . .' " Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 297, 102 S.Ct. 434, 437-38, 70 L.Ed.2d 492 (1981) (citations and quotations omitted). I take this to mean that a contribution large enough to support at least the appearance of a political quid pro quo is "large." This interpretation is, of necessity, fact-specific. The record here, unlike the meager record available to the court in Carver makes such a determination possible.

In the case of Representative Maddox, for example, approximately seventy percent of his campaign funds came from business interests in individual contributions ranging between $200 and $1000. Assuming Representative Maddox spent everything he raised, a single $1000 contribution accounted for more than three percent of his total expenses. It is both the large size of these contributions relative to Representative Maddox's total campaign expenditures and the nature of the contributors that could give rise to a reasonable perception of undue influence. Similarly, of his total campaign expenses,

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Representative Dietz raised roughly twenty percent from tobacco interests, which contributed in amounts between $200 and $1000. Considered in the light of Representative Dietz's subsequent support for the tobacco bill, these contributions are large enough to support a reasonable perception of undue influence.

According to Mr. Stern's study, in the general election races for the Arkansas State Senate in 1992, 1994, and 1996, candidates raised an average of $22,500 including the candidates' own money and loans. During the same election years, candidates for the Arkansas House of Representatives raised, on average, $7550, also including personal contributions and loans. Of these averages, a single $1000 contribution equates to over four percent in the Senate races, and over thirteen percent in the House races. Clearly, a single $1000 contribution in these elections is significant. Therefore, I find that, for these non- statewide races, a $1000 contribution is sufficiently large to support a reasonable perception of undue influence.

In contrast, in Arkansas' 1994 gubernatorial general election, each candidate spent over $900,000. Of this total, $1000 is only about one-tenth of one percent. I conclude that under these facts, a $1000 contribution in a statewide race is not large enough to readily support a reasonable[15] perception of undue influence. This conclusion finds support in the fact that the Buckley Court did not consider a $1000 contribution to be large. The FECA contribution limits considered in Buckley applied to races for both houses of Congress as well as the

15. I use the word "reasonable" because I assume that any contribution would cause some supersensitive souls to perceive undue influence.

Presidential race. Of course, U.S. Senators are elected in each state on a statewide basis, and U.S. Representatives on a district basis. As of the 1990 census, Arkansas has four congressional districts, each with a population of roughly 590,000. While Buckley did not hold that $1000 is a "constitutional minimum," it seems clear that a $1000 contribution in 1997 dollars is not "large" in a statewide race when it was not large in 1976 dollars (when Buckley was decided), or in 1971 dollars (when FECA was enacted).[16]

Having decided that a $1000 contribution is not large for statewide races in Arkansas, I find that the State lacks the compelling interest necessary to justify further limiting contributions in the "statewide races," as well as elections for the offices of state Supreme Court Justices and Judges of the Court of Appeals.

But what of non-statewide races? Because I have concluded that a $1000 contribution to candidates for non-statewide races in Arkansas is large, I must consider whether the $100 limit imposed by Act I is too small to be constitutional. In Buckley, the Supreme Court observed that the FECA limits were not structured to take into account the widely ranging financial needs of the congressional and presidential campaigns. The Court declared, " '[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.' Such distinctions in degree become significant only

16. The Eighth Circuit, in Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir.1994) noted that a $100 contribution in 1976 dollars was worth $40.60 in 1994. Dr. Herbert Alexander, a witness for the plaintiffs, testified that a $1000 contribution when FECA went into effect (1971) would be worth from $300 to $325 in 1997.

when they can be said to amount to differences in kind." Buckley, 424 U.S. at 30, 96 S.Ct. at 640 (quoting Buckley v. Valeo, 519 F.2d at 842).

As noted, the Carver court found the Missouri contribution limits to be a difference in kind compared to the FECA limits considered in Buckley. Carver, 72 F.3d at 644. In its degree-versus-kind analysis, the Carver court emphasized: (1) the Missouri limits were per election cycle as opposed to per election in Buckley; (2) after adjusting for inflation, the Missouri limits were an even smaller fraction of the FECA limits upheld in Buckley than the bare numbers would indicate; (3) the state's evidence concerning corrupting contributions involved amounts in the hundreds of thousands of dollars, whereas the contribution limits imposed by the challenged statute ranged only from $100 to $300 dollars; (4) the state adduced no evidence that the particular limits chosen were narrowly tailored to address corruption or the appearance of corruption associated with large campaign contributions; and (5) a much higher percentage of contributors would be affected by the Missouri limits than were affected by the FECA limits at issue in Buckley. Carver, 72 F.3d at 641-44.

In deciding whether the $100 limit represents a difference in kind, I begin by addressing the factors upon which the Eighth Circuit relied in Carver. First, Act I's contribution limits apply on a per election basis. This means that the Act's limits apply anew in each election within an election cycle — primary, general election, and any run-off. In contrast, the Missouri law applied to the election cycle as a single unit.

Second, the Carver court discussed the erosive effects of inflation in comparing FECA limits at issue in Buckley to the

Missouri limits. This discussion applies here as well. In 1976 dollars, Act I's $100 limit shrinks to less than forty percent of its face value, and only four percent of the federal $1000 limit upheld in Buckley. See Carver, 72 F.3d at 641 (citing Day v. Holahan, 34 F.3d 1356, 1366 (8th Cir.1994)).

Third, in contrast to Carver, where state contribution limits were imposed for the first time, here the perceived undue influence argued by the defendants and Citizens occurred in spite of the $1000 limit already established by Arkansas. As to statewide races, a $1000 contribution is not large, and Act I's $300 limit is unconstitutionally low. However, as to non-statewide races, I do find a $1000 contribution to be "large." The defendants' argument that the $100 limit has been narrowly tailored is convincing, particularly in light of Carver. I see this as a close call.

Fourth, in contrast to the Carver case, the defendants and Citizens introduced substantial evidence of the need for the reduced limits found in Act I. For example, the Stern study, as well as reports compiled by ACORN, indicate that large contributions, as defined by this Court, have led to the perception of undue influence in non-statewide races.

Fifth, in Carver, the Eighth Circuit noted that a sizable percentage of contributors would be affected by the new limits. An even higher percentage of contributors will apparently be affected by the Act I limits here. Mr. Stern's study indicates that the $100 limit will affect as much as eighty percent of contributions in Arkansas Senate and House races.

I find persuasive the Citizens' argument that contribution limits amount to a difference in kind, when compared to the

limits upheld in Buckley, because the limits do not permit the same quality of political expression and association that the FECA limits allowed. In upholding FECA's $1000 contribution limit, the Buckley Court concluded that the limit:

> focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.
>
> Significantly, [FECA's] contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

424 U.S. at 28-29, 96 S.Ct. at 639-40. See also id. at 21, 96 S.Ct. at 636 ("contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy"). Thus for Act I's limits to impermissibly affect First Amendment rights, the limits must "undermine to [a] material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." Id. at 29, 96 S.Ct. at 639-40.

I conclude that Act I's $100 contribution limits applicable to candidates in non-statewide races (excepting races for the offices of Arkansas Supreme Court Justice, and Arkansas Court of Appeals Judge) do not burden the potential for effective political dialogue to the extent that the limits can be said to represent a difference in kind. Applied in this case, the factors on which the Carver court relied do not alone provide a clear answer as to the degree-versus-kind question. However, this Court has had the benefit of evidence presented during a seven-day trial, including evidence derived from special elections conducted under the Act I limits.

The defendants and Citizens introduced evidence showing that the cost of running Arkansas House of Representatives and Senate races in the past three election cycles averaged between $7000 and $16,000 per election for the Arkansas House and between $23,000 and $39,000 per election for an Arkansas Senate seat. If a candidate for each of these positions raised all of her funds from $50 contributions (half of the Act I limit), a House candidate would need 320 contributors, and a Senate candidate would need 780 contributors to meet the highest of these historical cost levels. This hypothetical does not include contributions from political parties, small donor PACs, or candidates' personal contributions. Evidence admitted at trial showed that the population of an Arkansas House district is roughly 24,000 and that of a senate district is approximately 68,000. Thus I find credible the testimony of state legislators, including former Arkansas Representative Mark Pryor and Arkansas Senator Phil Wyrick (also a former Representative), that they will be able to raise adequate funds to run effective campaigns.[17] I consider it significant that no officeholder

17. As a candidate for State Representative in two successful races prior to Act I, Mr. Pryor testified he raised sufficient funds to run effective (Cont'd)

testified that she would be unable to run an effective campaign with the $100 limit, although two professional fundraisers did so testify. In the two special elections held in January 1997 under Act I, the evidence shows that the candidates were able to raise contributions exceeding the average amount raised by open-seat candidates in primary elections during the past three election cycles. Senator Wyrick, for example, testified that he raised approximately $24,000 for his successful Arkansas Senate race under the Act I limits, while his opponent raised about $40,000.

There are two exceptions to the finding that the $100 limit is constitutional. Act I omits from its definition of statewide offices the office of state Supreme Court Justice, even though these judges are elected in statewide races. Act I sets a $100 per election limit on the twelve judges of the Court of Appeals, who are elected from districts of equal populations.[18] In Arkansas, judicial candidates and judicial races are subject to more stringent restrictions in solicitation than other candidates. Under Canon 5C(2) of the Arkansas Code of Judicial Conduct, a judge or candidate for judicial office subject to a public election may neither personally solicit nor accept campaign contributions. Canon 5C(2) also restricts candidate committees acting on behalf of judges or candidates from soliciting earlier than 180 days prior to a primary election, or later than forty-

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(Cont'd)
campaigns under a self-imposed contribution limit of $250. Mr. Pryor ran an unsuccessful race for the statewide office of Attorney General in 1996, and intends to run for that office again in 1998.

18. Ark.Code Ann. § 16-12-101. Prior to July 1, 1995, the Arkansas Court of Appeals was composed of six members. After that date, the membership was increased to twelve. Id.

five days after the last contested election in which the candidate participates.

The defendant's witness, Mr. Stern, testified that the $100 limit on contributions to Arkansas Supreme Court Justices was the most troubling aspect of Act I, although he suggested that this requirement was justifiable. I am also troubled by the limit, and do not think it justifiable. Several witnesses explained that a candidate is typically her own best fundraiser. Yet a judge cannot personally solicit funds. A Supreme Court Justice must nevertheless mount a statewide campaign, and Court of Appeals Judges must run in districts much larger than state senate districts.[19] I conclude that this combination of obstacles prevents candidates for these judicial positions from "amassing the resources necessary for effective advocacy." Therefore, I find that Act I's $100 limit, as applied to Arkansas Supreme Court Justices and Arkansas Court of Appeals Judges, amounts to a difference in degree when compared to those upheld in Buckley. It is, thus, unconstitutionally low.

2. Contributions to PACs

The plaintiffs also complain that the $200 limitation on contributions to approved PACs is so low that it unconstitutionally infringes on their First and Fourteenth Amendment rights to free speech and association. Each party cites California Medical Ass'n v. FEC, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) as controlling on this issue. In California Medical, a federal PAC complained of FECA's $5000 per year limit on contributions to multicandidate federal PACs. Upholding the challenged provision of FECA, a plurality of the Court concluded that the limitations on contributions to

19. Arkansas currently has 35 senate districts.

PACs was justified by the government's interest in "preventing the actual or apparent corruption of the political process." Id. at 197, 101 S.Ct. at 2722. The plurality feared that actual or perceived corruption would arise if individuals and unincorporated associations were able to channel unlimited funds through PACs to candidates, thereby circumventing the $1000 limit on contributions to individual candidates. Id. at 198, 101 S.Ct. at 2722-23. Further, the Court reasoned that when a contributor's First Amendment rights are not infringed by limits on his contributions to a candidate's campaign, those rights "are similarly not impaired by limits on the amount he may give to a multicandidate political committee. . . ." Id. at 197, 101 S.Ct. at 2722.

The plaintiffs point out that FECA limited contributions to candidates to $1000 per election, and contributions to PACs to $5000 per year. They then suggest that it would be irrational for Arkansas to limit contributions to PACs to only $200 per year while allowing $300 contributions to individuals per election. The defendants counter that the 1990 limit allows substantial participation in Arkansas' elective process while serving to prevent circumvention of the limits imposed on individual contributions. Citizens add that a limit on contributions to PACs is even more warranted in Arkansas than under the federal scheme. They note that the federal PACs in California Medical were required to enlist at least fifty contributors and contribute to no fewer than five candidates. Id. at 185 n. 1, 101 S.Ct. at 2716 n. 1. Arkansas imposes no such requirements. Similarly, Citizens argue, Arkansas has no corollary to FECA's $25,000 annual limitation on total contributions by an individual. See Buckley, 424 U.S. at 38, 96 S.Ct. at 644.

Appendix B

Having determined that Act I's $300 per election limit on contributions to candidates for statewide race are unconstitutionally low, this Court is sympathetic to the argument that a $200 limit on annual contributions to PACs is similarly infirm. This view finds support in Day v. Holahan, 34 F.3d 1356 (8th Cir.1994). In Day, the court deemed unconstitutional a Minnesota law limiting contributions to a political committee or political fund to no more than $100 per year. The Day court recognized the state's compelling interest in avoiding "corruption or the appearance of corruption in the political process that could result from large amounts of special interest money circulating in the system. . . ." Id. at 1365. However, it declared that "the fighting issue" presented was whether the $100 limit had been narrowly tailored to serve that interest, in the light of the burden it placed on political speech. Id. The court based its finding that the limit was too low to allow meaningful participation in protected political speech and association on: the reduced danger of actual or perceived corruption when contributions are to a political committee rather than a candidate; the fact that $100 in 1994 dollars was a scant four percent of the $1000 limit upheld in Buckley; and the fact that one-fourth to one-third of the Appellant political fund's contributions in the previous election cycle had exceeded $100. Id. at 1365-66.

I find Day distinguishable and conclude that the $200 limit is constitutional. I am impressed by the fact that even though the limit has been in place since 1990, the plaintiffs do not contend that this limit has significantly infringed their First Amendment rights. In fact, much of the evidence in this case supports the conclusion that PAC contributions to candidates in Arkansas have been robust and that the $200 limit has not prevented "political committees from amassing the resources

necessary for effective advocacy." Buckley, 424 U.S. at 21, 96 S.Ct. at 636. Thus, unlike where the court was left to speculate on the effect of the challenged amendments to Minnesota's campaign finance laws, this Court is able to consider the impact of a law that has been in effect for a number of years, and the evidence reflects no appreciable infringement.

D. Deference to Initiated Acts

Citizens urges the Court to accord substantial deference to the voters' judgment in approving Act I, which they contend is an essentially legislative determination. They cite Turner Broadcasting System, Inc. v. FCC, 512 U.S. at 665-66, 114 S.Ct. at 2470-71: "[C]ourts must accord substantial deference to the predictive judgments of Congress." The proponents of the challenged act in Carver advanced the same argument. The Carver court rejected this argument: "First, . . . the voters may no more violate the Constitution than the legislature[,]" and "[s]econd, the deference to legislative enactments recognized in Turner Broadcasting System requires that courts ascertain that the legislative body 'has drawn reasonable inferences based on substantial evidence.' " 72 F.3d at 644 (internal citations omitted). The court explained: "There is simply no evidence in the record identifying the source of Proposition A, whether it was an individual or a group, the process of its development, nor the reasons for the particular dollar limits. Further, there is no evidence of the details of the campaign waged in support of the initiative." Id. The court continued:

> Whether the deference Turner Broadcasting System requires for acts of Congress extends to the acts of the state legislative body is an issue not before us to decide. Legislative bodies consist of elected

> representatives sworn to be bound by the United States Constitution, and their legislative product is subject to veto by the elective executive, either President or Governor. The process of enactment, while perhaps not always perfect, includes deliberation and an opportunity for compromise and amendment, and usually committee studies and hearings. These are substantial reasons for according deference to legislative enactments that do not exist with respect to proposals adopted by initiative. On the evidentiary showing before us, there is no justification to accord Proposition A the deference that [Turner] requires for congressional action.

Id. at 644-45 (internal citation omitted). In this case there was some evidence regarding the drafting of the Act, and the campaign (as will be discussed in the next section, some of the supporting campaign literature contained a constitutionally impermissible reason for supporting Act I). Nonetheless, neither the Supreme Court nor the Eighth Circuit has held that special deference should be given to state laws. Regardless of the force of the argument one might make, in the abstract, for deference to a direct vote of the electorate, the above quoted language from Carver clearly suggests that no such deference may be given.

Still, I understand that federal courts must be careful to not unnecessarily declare state laws invalid, whether enacted by legislature or by the voters themselves. In the interest of comity, although I have found Act I constitutionally infirm in part, I have done so with "considerable pause and deliberation." National Black Police Ass'n v. District of Columbia Bd. of

Elections & Ethics, 924 F.Supp. 270, 285 (D.D.C.1996), vacated, 108 F.3d 346 (D.C.Cir.1997).

E. Equal Protection Claim

Plaintiff AIAPAC argues that limiting approved PAC contributions to $100 and $300 per election, yet allowing small donor PACs to contribute $2500, treats similarly situated entities unequally and violates the Fourteenth Amendment. The Defendants and Citizens respond that this plaintiff's rights are unimpaired because its members are free to form a small donor PAC separate from AIAPAC.

As stated above, the Supreme Court has held that "statutory classifications impinging upon [the right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666, 110 S.Ct. 1391, 1401, 108 L.Ed.2d 652 (1990). In Austin, the Court was faced with an equal protection claim involving a Michigan statute prohibiting corporations from spending treasury funds for independent expenditures on behalf of political candidates. The Chamber of Commerce complained that unincorporated associations and media corporations were not similarly burdened. The Court upheld the statute because it was "precisely tailored" to serve the compelling state interest of preventing corporations from exploiting legal advantages to amass political "war chests." Id.

In California Medical, the Court decided an equal protection claim where FECA permitted labor unions and corporations to contribute to a separate segregated fund for political purposes, but restricted contributions by individuals and unincorporated associations to multicandidate political

committees. The Court determined that to prevail in its claim the plaintiff would need to satisfy a two-part analysis. First, the plaintiff would have to show the act burdened the First Amendment rights of individuals and unincorporated individuals to a greater extent than those of labor unions and corporations. Second, it would have to prove that this differential treatment was not justified. 453 U.S. 182, 200, 101 S.Ct. 2712, 2724, 69 L.Ed.2d 567 (1981). Because the Court found no discrimination, its analysis ended without considering the issue of justifiability. The Court noted that FECA was far less restrictive to individuals and unincorporated associations than to corporations and unions. To illustrate, the Court observed that individuals and unincorporated associations were able to contribute to candidates, to candidates' committees, and to national party and other committees, while corporations and unions could not. Moreover, multicandidate political committees could generally solicit as they pleased, while the manner and scope of solicitation by corporations and unions were "carefully limited" by FECA. Id. at 201, 101 S.Ct. at 2724. FECA's differing restrictions, reasoned the Court, "reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process." Id.

The question of discrimination is a close one. I recognize that the ability to raise money from a single contribution strongly favors approved PACs over small donor PACs — $200 compared to $25, an eight-to-one ratio. Yet the ability to contribute to a single candidate may be seen as even more strongly favoring the small donor PAC over approved PACs — $2500 compared to $100, a twenty-five-to-one ratio. I conclude that this substantial disparity is balanced by the fact

that small donor PACs can only receive contributions from individuals, while approved PACs may count among their donors other PACs, corporations, or unions. Furthermore, approved PACs are not limited in the total amount they can contribute overall, but only as to a single candidate. The Act I amendments do not burden the First Amendment rights of approved PACs to a more constitutionally significant extent than it burdens such rights of small donor PACs.

Moreover, even if the balance tipped in favor of small donor PACs, a heavier burden on approved PACs' First Amendment rights would be justified by the state's compelling interest in avoiding actual or apparent corruption. Act I's restricting small donor PACs to receiving no more than $25 in annual contributions from only individuals greatly diminishes the potential for actual or perceived corruption that can accompany contributions from approved PACs. Just as in California Medical, these restrictions reflect the judgment of the voters that these two types of PACs have "differing structures and purposes," and that different forms of regulation are permitted. Id.

F. State Interest in Leveling the Playing Field

Some of Citizens' campaign literature for Act I raises a nettlesome question. It urged, among other things, the adoption of Act I "to level the playing field" for candidates with modest financial resources. Many would think that this is a perfectly proper, or even a laudable, goal. However, in Buckley, the Supreme Court stated, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." 424 U.S. at 48-49, 96 S.Ct. at 649.

Scholars have challenged this language as "perhaps the most controversial and dubious statement"[20] in Buckley; however, neither the Supreme Court nor the Eighth Circuit has flinched since this passage was written in 1976. In Shrink Missouri Government PAC v. Maupin, the Eighth Circuit declared that "no subsequent decision of the [Buckley] Court has undermined that holding." 71 F.3d 1422, 1426 (8th Cir.1995). In Carver, the court warned that an amicus's suggestion that the state has a compelling interest in equalizing all citizens' ability to affect the outcome of elections was "close to running afoul of the Court's [above-quoted] statement in Buckley. . . ." 72 F.3d at 639 n. 6.

It is hard to understand how any law restricting the size of contributions (including the federal restrictions upheld in Buckley) would not have at least some tendency to level the playing field. Indeed, in a press release, Citizens noted that Act I would "help to level the political playing field by placing strict limits on campaign contributions and increasing the power of small donors through tax credits and the creation of small donor political action committees." However, the bulk of the Act I campaign literature appears to focus on the purpose of curbing the influence of special interests through large contributions, and "ending the cozy relationship of big money political contributions and incumbent politicians." Thus, the aim of leveling was apparently not the primary element of the campaign for Act I, and, on its face, the Act does not reveal leveling as its purpose.

In a similar vein, the plaintiffs warn that implementation of Act I's limits will increase the advantage enjoyed by wealthy

20. Jamin Raskin & John Bonifaz, Equal Protection and the Wealth Primary, 11 Yale L. & Pol'y Rev. 273, 320 (1993).

candidates over their less affluent opponents: candidates with personal wealth and the inclination to spend it on campaigns will not be hampered by having to raise money at even more limited levels or by having to worry about their opponent's greater access to costly media outlets. In fact, some of the defendants' and Citizens' witnesses conceded that Act I would likely increase this advantage, one that is apparently inherent to our electoral system. I believe that additional limits on campaign contributions will add to the wealthy candidate's edge. However, in Buckley the Supreme Court addressed the issue of limiting the amount of money a candidate could contribute to her own campaign. The Court held that "the First Amendment simply cannot tolerate [FECA's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." 424 U.S. at 54, 96 S.Ct. at 651. The Court reasoned that the government's interest in preventing actual or perceived corruption did not support such a limitation when the funds involved come from the candidate or the candidate's immediate family. Id. at 53, 96 S.Ct. at 651. While Buckley's reasoning has been questioned by some commentators,[21] it is the law that the state cannot limit a candidate's contributions of her own money to her campaign. Just as the poor will apparently always be with us,[22] it appears that, in politics, so will the wealthy. Any limits on contributions will tend to favor the wealthy, but, under Buckley, this cannot be avoided, and this fact will not void otherwise valid limits.[23]

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21. See e.g., Raskin & Bonifaz, supra, at 315-31.

22. St. John 12:8.

23. In Justice White's view, a long-time minority view, as noted earlier, reasonable restrictions could be placed on a candidate's personal

(Cont'd)

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G. Severability

Severability is a matter of state law. Leavitt v. Jane L., 518 U.S. 137, __, 116 S.Ct. 2068, 2069, 135 L.Ed.2d 443 (1996). The Arkansas Supreme Court has instructed, "[i]n determining whether the invalidity of part of the act is fatal to the entire legislation, we have looked to (1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." U.S. Term Limits, Inc. v. Hill, 316 Ark. 251, 872 S.W.2d 349, 357 (1994). The court further explained that "it is important whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected. Clearly, when portions of an act are mutually connected and interwoven, severance is not appropriate." Id. 872 S.W.2d at 358. Courts will consider the presence of a severability clause in an act, but this may not be determinative of itself. Id. Act I contains the following severability clause:

> Section 15. If any provision or section of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or applications, and to this end the provisions of the act are declared to be severable.

(Cont'd)
contributions to her own campaign. Buckley, 424 U.S. at 266, 96 S.Ct. at 748-49. Also, the Eighth Circuit has upheld election laws that encourage "voluntary" expenditure limits by candidates. Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir.1996). Still, nothing is clearer in Buckley than the prohibition against government limits on personal spending. Buckley, 424 U.S. at 52-54, 96 S.Ct. at 651.

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The Court's ruling here has: upheld Act I's $100 per election contribution limit for elections involving non-statewide races (with the exception of the positions of Supreme Court Justice and Court of Appeals Judge); ruled unconstitutional the Act's $300 per election contribution limit on statewide races; upheld the preexisting $200 per annum contribution limit to PACs; and upheld the small donor PACs against the plaintiffs' challenge on equal protection grounds. Additionally, the Court has found the plaintiffs' challenge of Act I's provision for lower local contribution limits nonjusticiable for lack of ripeness. Finally, the Court has held that the plaintiffs lack standing to challenge Act I's provision for independent expenditure committees. The effect of this ruling leaves Act I intact, with the exception of the contribution limit for statewide races, and the application of the $100 limit to contributions to candidates for Supreme Court Justice and for Judge of the Court of Appeals.

Applying the U.S. Term Limits test, I find no single purpose behind Act I with which this Court's ruling will unduly interfere. Similarly, I see no fatal interrelation or interdependency between the stricken and upheld portions of the Act. In other words, I see no reason not to honor the intent of the drafters of Act I that, to the extent possible, the various provisions of the Act should stand on their own. As to elections for Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands, Court of Appeals Judge and Supreme Court Justice, the $1000 contribution limit applicable prior to Act I will continue to apply.

Appendix B

Conclusion

In summary, the Court finds the following sections of the Arkansas Code constitutional: section 7-6-203(a)(1) and (b)(1), except as it applies to the offices of Supreme Court Justice and Court of Appeals Judge; section 7- 6-201(9)(B); and sections 7-6-201 and 7-6-203(d). The Court declares unconstitutional, and thus enjoins the enforcement of, the following sections of the Arkansas Code: section 7-6-203(a)(2) and (b)(2); and section 7- 6-203(a)(1) and (b)(1) as it applies to the offices of Supreme Court Justice and Court of Appeals Judge. Further, the Court finds that the plaintiffs lack standing to challenge Arkansas Code sections 7-6-201(13) and (14), and 7- 6-203(k). The plaintiffs' challenge to Arkansas Code section 7-6-224 is dismissed because it is not ripe.

IT IS SO ORDERED.

APPENDIX C — INITIATED ACT I OF 1996

Section 1. Arkansas Code 7-6-201 is hereby amended to add the following new subdivisions:

"(12) A 'small donor political action committee' means any person who:

(A) Receives contributions from one or more individuals in order to make contributions to candidates;

(B) Does not accept any contribution or cumulative contributions in excess of twenty-five dollars ($25) from any individual in any calendar year; and

(C) Is registered pursuant to Arkansas Code 7-6-215 prior to making contributions to candidates. 'Small donor political action committee' shall not include an organized political party, the candidate's own campaign committee, or an exploratory committee.

(13) An 'independent expenditure' is any expenditure which is not a contribution and

(A) expressly advocates the election or defeat of a clearly identified candidate for office; and

(B) is made without arrangement, cooperation, or consultation between any candidate, or any authorized committee or agent of such candidate, and the person making the expenditure or any authorized agent of that person; and

(C) is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of the candidate.

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(14) 'Independent expenditure committee' means any person who receives contributions from one or more persons in order to make an independent expenditure and is registered pursuant to Arkansas Code 7-6-215 prior to making expenditures."

Section 2. Arkansas Code 7-6-203(a), (b) and (d) are hereby amended to read as follows:

"(a)(1) It shall be unlawful for any candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of one hundred dollars ($100) per election from any person.

(2) It shall be unlawful for any candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or for any person acting on the candidate's behalf, to accept campaign contributions in excess of three hundred ($300) per election from any person.

(b)(1) It shall be unlawful for any person to make a contribution to a candidate for any public office, except the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds one hundred dollars ($100) per election.

(2) It shall be unlawful for any person to make a contribution to a candidate for the office of Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, or to any person acting on the candidate's behalf, which, in the aggregate, exceeds three hundred dollars ($300) per election.

(d) However, an organized political party as defined in Arkansas Code 7-1-101(1) and a small donor political action committee may contribute up to two thousand five hundred dollars ($2,500) to each candidate per election."

Section 3. Arkansas Code 7-6-203 is hereby amended to add the following new subsection:

"(k) An independent expenditure committee may not accept any contribution or cumulative contributions in excess of five hundred dollars ($500) in value from any person in any calendar year."

Section 4. Arkansas Code 7-6-207(b)(1)(B) is hereby amended to read as follows:

"(b)(1)(B) The name and address of each person, including the candidate, who made a contribution or contributions which, in the aggregate, exceed fifty dollars ($50), the contributor's principal place of business, employer, occupation, and date of the contribution and the amount contributed."

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Section 5. Arkansas Code 7-6-208(b)(1) is hereby amended to read as follows:

"(b) CONTENTS OF REPORT

(1) The campaign contribution reports required by subsection (a) of this section shall indicate the total amount of contributions received during the filing periods and the name, address, principal place of business, employer, occupation, and the amount and date of contribution for each person, including the candidate, who makes a contribution or contributions which, in the aggregate, exceed fifty dollars ($50). The reports shall be filed with the county clerk in the county in which the election is held."

Section 6. Arkansas Code 7-6-209(b)(1) is hereby amended to read as follows:

"(b) CONTENTS OF REPORT

(1) The campaign contribution reports required by subsection (a) of this section shall indicate the total amount of contributions received during the filing periods and the name, address, principal place of business, employer, occupation, and the amount and date of contribution for each person, including the candidate, who makes a contribution or contributions which, in the aggregate, exceed fifty dollars ($50). The reports shall be filed with the county clerk in the county in which the election is held."

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Section 7. Arkansas Code 7-6-215 is hereby amended to add the following new subsection:

"(c) A small donor political action committee shall comply with all provisions of this section."

Section 8. Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:

"7-6-220. Reporting of Independent Expenditures.

(a) A person or an independent expenditure committee who makes independent expenditures in an aggregate amount or value in excess of $500 shall file reports with the Secretary of State: (1) no later than thirty (30) days prior to preferential primary elections, general elections and special elections covering the period ending thirty-five (35) days prior to such elections; (2) no later than seven (7) days prior to preferential primary elections, runoff elections, general elections, and special elections covering the period ending ten (10) days prior to such elections; and (3) as for a final report, no later than thirty (30) days after the end of the month in which the last election is held at which the candidate seeks nomination or election. Such reports shall include:

(1) In the case of an individual making such an expenditure, the name, address, telephone number, principal place of business, employer and occupation of the individual; in the case of a committee, the name, address, employer, and occupation of its officers. In the case of a person who is not an individual, the principal name of the entity, the

address, and the name, address, employer, and occupation of its officers.

(2) The same information required of candidates for office other than school district, township, municipal, or county office as set forth in Arkansas Code 7-6-207(b)(1)(A) through (E)."

Section 9. Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:

"7-6-221. Independent Expenditure Disclosure.

(a) Any person making an independent expenditure shall name and identify itself using a name or phrase that clearly identifies the person in all of its communications with the public concerning any candidate and such communications must include in a prominent manner the following notice: 'This communication is not authorized by any candidate or candidate committee'."

Section 10. Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:

"7-6-222. Tax Credits for Certain Individual Political Contributions.

(a) Pursuant to regulations to be adopted by the Arkansas Department of Finance and Administration, a single credit against individual Arkansas income taxes shall be allowed for money contributions made by the taxpayer in a taxable year to one or more of the following:

(1) A candidate seeking nomination or election to a public office at an election, or to the candidate's campaign committee; or

(2) A small donor political action committee as defined in Arkansas Code 7-6-201; or

(3) An approved political action committee as defined in Arkansas Code 7-6-201; or

(4) An organized political party as defined in Arkansas Code 7-1-101(1).

(b) The credit allowed by subsection (a) of this section shall be the aggregate contributions, not to exceed fifty dollars ($50) on an individual tax return, or the aggregate contributions, not to exceed one hundred dollars ($100) on a joint return."

Section 11. Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:

"7-6-223. Reports of Contributions by Political Parties.

Organized political parties as defined in Arkansas Code 7-1-101(1) shall file an annual report with the Secretary of State no later than January 15 of each year, beginning in 1998, providing the name, address, employer and occupation of each person who made a contribution or contributions to the political party or any authorized committee, which in the aggregate exceeded $250 in the preceding calendar year. The

report shall include the date and amount of each such contribution."

Section 12. **Arkansas Code Title 7, Chapter 6, Subchapter 2 is amended by adding the following new section:**

"7-6-224. Authority of Local Jurisdictions.

Municipalities, counties and townships shall have the authority to establish: reasonable limitations on the time periods candidates for local office shall be allowed to solicit contributions; limits on contributions to local candidates at amounts lower than those set by state law; and voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies."

Section 13. Effective date.

The provisions of this initiated act shall become effective on January 1, 1997 except that the provisions in Sections 2 and 3 herein shall become effective on November 6, 1996.

Section 14. All laws and parts of laws in conflict with this act are hereby repealed.

Section 15. If any provision or section of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions

or applications, and to this end the provisions of the act are declared to be severable.

Section 16. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the code.

Supreme Court, U. S.
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No. 98-397 and 98-399

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission ..... *Petitioners*

and CITIZENS FOR CLEAN GOVERNMENT ..... *Intervenor*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE ..... *Respondents*

CITIZENS FOR CLEAN GOVERNMENT ..... *Petitioner,*

vs.

RON RUSSELL, KENT INGRAM, WILLIAM R. AUSTIN, and ASSOCIATED INDUSTRIES OF ARKANSAS POLITICAL ACTION COMMITTEE

–and–

TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission, ... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER ARKANSAS' $100 AND $300 PER ELECTION PER CANDIDATE CONTRIBUTION LIMITS TO CANDIDATES, ITS $200 ANNUAL CONTRIBUTION LIMIT TO APPROVED POLITICAL ACTION COMMITTEES, AND ITS $2,500 PER CANDIDATE PER ELECTION CONTRIBUTION LIMIT FROM SMALL DONOR POLITICAL ACTION COMMITTEES TO CANDIDATES VIOLATE THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

LIST OF PARTIES TO THE PROCEEDING

The parties to this case are as follows: The Respondents are Ron Russell, Kent Ingram, William R. Austin, and Associated Industries of Arkansas Political Action Committee. The Petitioners in Case No. 98-399 are Troy Burris, Chairman of the Arkansas Ethics Commission, Rita Looney, Tom Alexander, Ben Allen, and Jack Kearney, Arkansas Ethics Commissioners, and the Petitioner in Case No. 98-397 is Citizens For Clean Government.

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TROY BURRIS, in his official capacity as chairperson of the Arkansas Ethics Commission and JACK KEARNEY, TOM ALEXANDER, RITA LOONEY, and BEN ALLEN, in their official capacities as members of the Arkansas Ethics Commission, ... *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Chairman and Members of the Arkansas Ethics Commission (hereinafter referred to as the State) and Citizens for Clean Government, Intervenor below, (hereinafter referred to as Citizens) have separately filed Petitions for a Writ of Certiorari in this Court. Since both petitions arise out of the same case and both petitions make similar arguments, Respondents will respond to both petitions in this pleading.

As required by Rule 15, Respondents call to the Court's attention that the Statement of the Case presented by Citizens incorrectly treats this as a public subsidy case and states that there is public funding that could reach $50 million annually in Arkansas caused by a $50 per individual income tax credit ($100 for joint filers) authorized by Act I. The tax credit is not public funding as it only provides a tax credit for state income taxpayers who contribute to political candidates, parties, and Political Action Committees. Arkansas law does not provide for payment of any funds by the government to any candidate. Furthermore, there is no evidence in the record of the number of taxpayers affected or the amount they would claim as a credit. Other factual and legal distinctions will be discussed in the argument portion of this Response.

For purposes of this response, Respondents accept the Statement of the Case presented by the State, except when it infers that the tax credit is a "public subsidy."

ARGUMENT

THERE ARE NO COMPELLING REASONS TO GRANT THE WRIT.

Respondents contend there are no compelling reasons for this Court to exercise its judicial discretion to grant the writ. First, there is no conflict among the circuits or decisions of this Court as every case cited, including this case, followed *Buckley v. Valeo*, 424. U.S. 1 (1976). Secondly, the Eighth Circuit did not decide an important federal question in a way to conflict with a state court of last resort, and, thirdly, the Eighth Circuit has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court. Finally, the Eighth Circuit has not decided an important question of federal law that has not been settled by this Court. *Buckley, supra*, only twenty-two years old, settled all questions raised by Petitioners.

This case was correctly decided by the Eighth Circuit after applying the principles of *Buckley, supra*, to the facts presented during a seven-day trial. The petitioners simply do not like the results of this factual review.

A. THIS IS NOT A CASE INVOLVING PUBLIC FUNDING OF CAMPAIGNS

Respondents make three initial observations about statements in the Petitions which leave the wrong impression of what this case is about. First, Citizens attempt to make this a public subsidy case. In their Petition the term "generous public campaign subsidy" is used. This is not a public subsidy case. A public subsidy is a direct payment from the government to the candidate or his campaign of governmental funds. Usually a public subsidy is associated

with something in return from the candidate or campaign, i.e., spending limits, contribution limits, or other restrictions on the candidate or his campaign, with an added provision that the candidate can opt out of the program. There are no such provisions in Arkansas law.

Here the "generous public subsidy" is a tax credit of up to $50.00 to an individual or $100.00 to joint filers. This tax credit only benefits the contributor who makes a political contribution. No public funds go to a candidate or his or her campaign. Indeed, even if one assumed for the sake of argument that the tax credit was a form of an indirect public subsidy, an individual candidate may never receive any benefit from the "indirect public subsidy" because the candidate may not receive a contribution from a taxpayer, or the taxpayer may have already given contributions in excess of his tax credit.[1] In addition, the candidate has to compete with political parties and political action committees for contributions as well as other candidates. In Arkansas there will be 5,926 offices filled in 1998. Many of the candidates had opponents in the party primaries, and many will have general election opponents. The irony of the tax credit is that it does not include any benefit for low to moderate income individuals in Arkansas who do not pay Arkansas income taxes.

In addition to incorrectly referring to the tax credit as a "generous or huge public subsidy," Citizens leaves the impression that more than one million taxpayers may contribute $50 million into political speech by making contributions. There is no evidence of any benefit from the

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[1]Since Arkansas has elections for many offices every two years, many candidates and officeholders will be encouraged to have a perpetual fund-raising effort in order to allow contributors to utilize their off election year tax credit.

tax credit, and any number advanced is pure speculation.[2]

The third observation is that Act I was advanced as an attempt to meld campaign subsidies and contribution limits into "an innovative, integrated system of campaign finance regulation that both prevents corruption and enhances political equality, while emphasizing the importance of individual participation." (Citizens Petition, p. 5) In fact, the campaign for Act I emphasized leveling the playing field by (1) ending corruption by "big" money by limiting contributions to $300 and $100, (2) increasing participation in the political system by creating the tax credit and Small Donor PACs, and (3) bringing more sunshine by adding lower disclosure provisions. The proponents emphasized that their concern was that winners raise more money than losers, incumbents raise more than challengers, and incumbents receive more contributions from special (business) interests, which they argue gives the appearance of corruption.

The Eighth Circuit held that Act I provided a subsidy and limitation scheme of sorts, but not the type approved in *Buckley*. *Buckley* approved the presidential campaign finance system that disallows contributions to the candidate after nomination in return for receipt of a set amount of dollars from the federal government for the general election.[3] The Eighth Circuit is correct.

Both petitions incorrectly state that the Eighth Circuit created a new standard of proof that imposes "an impossibly

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[2] The tax credit in Arkansas is not like the tax refund in Minnesota that was testified to at trial as the Minnesota tax refund program allows the contributor to receive a refund from general revenue, even if he does not have an income tax liability.

[3] That amount, $20 million in 1976, gave each of the major party candidates the same amount to spend on the general election campaign. The amount is adjusted annually for inflation.

stringent burden of justification of Arkansas' decision to adopt a $300 contribution ceiling in most statewide races and a $100 cap in other races" by requiring proof that contributions marginally in excess of $300/$100 had functioned as bribes, causing public officials to alter their official behavior. The Eighth Circuit simply held that the evidence offered to justify the low limits was insufficient. The Eighth Circuit held that a $1,000 campaign contribution, in itself, does not have an appearance of corruption, that $1,000 is not a large contribution as defined by *Buckley, supra*, that the limits were not narrowly tailored, and that the $300/$100 limits were a difference in kind from the limits allowed in *Buckley*.

In discussing the evidence, the Eighth Circuit pointed out types of evidence that might lead to a perception of undue influence or the appearance of corruption. A change of position following a large contribution or an effort to secrete a large contribution might give rise to the appearance of corruption spawned by a large contribution. However, here there was no individual contribution over three election cycles in excess of the $1,000 limit, no evidence proving that the official actions of any official was affected by a political contribution, and no evidence that any effort was made to conceal any contribution.[4] The Eighth Circuit is correct in its analysis because *Buckley* states that the compelling state interest is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of *large* financial contributions on *candidates' positions and on their actions if elected to office*." (emphasis added) Only when this test is met may limits be enacted, and they must be narrowly tailored to address the harm.

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[4]Arkansas law, prior to Act 1, required any contribution or aggregate of contributions from any person of over $100 to be disclosed.

Act I was not intended to be comprehensive campaign finance reform. It did not address soft money. It did address independent expenditures by committees formed to support or oppose a clearly identified candidate by limiting contributions to $500 annually to the committee,[5] but not other independent expenditures. It did not address true public financing of campaigns in return for spending limits. Act I was intended to limit the First Amendment rights of some in order to enhance the position of others.

B. THE EIGHTH CIRCUIT FOLLOWED THE STANDARDS ANNOUNCED IN BUCKLEY V. VALEO AND CALIFORNIA MEDICAL ASSOCIATION V. FEDERAL ELECTION COMMISSION (CAL-MED)

An analysis of the Eighth Circuit's opinion demonstrates that it addressed the issues raised in the Petitions and correctly rejected them.

(a) Strict scrutiny is the proper standard

In its analysis, the Eighth Circuit first determined that the appropriate standard for review of the Government's attempts to limit campaign contributions is strict scrutiny. The Eighth Circuit rejected the argument that a more lenient standard of review was required because the Act included not only contribution limits but also a "public subsidy" scheme. The "public subsidy" scheme is not a subsidy

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[5]Although Respondents were found to lack standing to attack this provision, another case decided on the same day where standing exists challenges that provision. *Arkansas Right to Life State Political Action Committee v. Butler*, Case No. 98-1215 and 1218 (8th Cir., June 4, 1998). The Eighth Circuit affirmed the finding that the $300 contribution limit was unconstitutional and remanded the other issues that had not been decided to the District Court. No Petition for Writ of Certiorari was filed from the Eighth Circuit decision.

at all, as it does not provide for the transfer of any money to any candidate, but is in reality a tax credit against Arkansas State Income Tax. The tax credit is designed to encourage contributions to political candidates, PACs or political parties by more people. Tax credits and deductions are not a new idea. At one time Arkansas allowed a tax deduction for certain political contributions. The Eighth Circuit pointed out that the Court had approved a voluntary campaign subsidy and limitation scheme in Minnesota because that scheme presented candidates with an additional optional campaign funding choice with participation being voluntary. *Rosentiel v. Rodriguez*, 101 F.3rd 1544, 1552 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1820, 1337 L.Ed.2nd 1028 (1997). The Court distinguished the schemes upheld in *Buckley* and *Rosentiel* from the Act I scheme because Act I was imposed upon all candidates and no candidate had the power to opt out. They declined to apply a standard of scrutiny to this case different from the one adopted in *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033, 116 S.Ct. 2579, 135 L.Ed.2d 1094 (1996), *Buckley v. Valeo, supra*.

The Court also held that what Petitioners tried to identify in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364, 1370, 137 L.Ed.2d 589 (1997) as a weighing test, rather than strict scrutiny, was no more than a restatement or reformulation, not a modification, of the Supreme Court's familiar strict scrutiny analysis and rejected the argument that imposed a lesser burden than exacting review and pointed out that *Timmons* reiterated that strict scrutiny applies.

(b) The compelling state interest identified is correct

The Eighth Circuit next quoted *Buckley, supra*, in identifying the compelling State interest as "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial con-

tributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. See also, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985). Applying this standard to the facts before it, the Court first found that there had been no "credible evidence of actual undue influence or corruption stemming from large contributions." *Russell v. Burris, supra* (State App. A-11). The Court made an independent examination of the whole record and specifically found, "that $1,000 is simply not a large enough sum of money to yield, of its own accord without further evidence, a reasonable perception of undue influence or corruption." *Russell v. Burris, supra* (State App. A-12, 13) In a strictly fact oriented discussion, the Court explained that the Petitioners, by pointing to the identity of the contributors and their subsequent interest in legislation, are not complaining about the size of the contributions, but who contributes. The Court concluded that there was insufficient evidence to establish a reasonable perception of undue influence or corruption spawned by large contributions. There was no contribution over the legal limit in Arkansas of $1,000 per election during the three election cycles examined.

(c) The Eighth Circuit's review of the evidence is correct

The Petitioners incorrectly argue that the Eighth Circuit required the Petitioners to prove that a candidate or office holder changed his position due to an intervening contribution or attempted to conceal his contribution or that there had been some exorbitantly large (in Arkansas illegal) contribution in order to meet the burden of a reasonable perception of undue influence or corruption caused by large contributions. In fact, what the Court found was that there was insufficient evidence to support a reasonable percep-

tion of undue influence or corruption. The Court suggested the type of evidence which may give a reasonable perception of undue influence or corruption that was not present in this case. The Court in no way attempted to establish any new standard. It simply pointed to the deficiencies in the evidence before it.

(d) Act I contributions are too low

The Eighth Circuit found that the candidate contribution limits in Act I are too low to allow meaningful participation in protected speech and association just as they found in *Carver v. Nixon*, 72 F.3rd at 641-42. The $1,000 contribution limit approved in *Buckley* has eroded approximately 60% of the value of the dollar since 1976. Therefore, a $1,000 contribution in 1976 is about the same as a $2,500 contribution in 1998. The limits prescribed by Act I, adjusted for inflation, are approximately 4% or 12% respectively of the limits upheld in *Buckley*. The Court, following its earlier reasoning in *Day v. Holohan*, 34 F.3d 1356 (8th Cir. 1994) *cert. denied*, 513 U.S. 1127 (1995), and *Carver v. Nixon, supra*, found that the limitations in Act I are a difference in kind from the limits upheld in *Buckley* and are unconstitutionally low.

(e) Act I contribution limits are not narrowly tailored

The Court held that even if there were a compelling state interest in preventing the perception of corruption or undue influence due to any of the various concerns identified by the Petitioners, Act I was not narrowly tailored to address those concerns. The Court found Act I to be both overinclusive and underinclusive by limiting the free speech of all who would contribute without addressing specific concerns identified.

It is axiomatic that since there were no large contributions in Arkansas (i.e., over $1,000) prior to Act I, there was no evidence of a harm to be corrected. Therefore, there

was no way to narrowly tailor contribution limits to address a harm. The harm identified by the Petitioners was the source of the contribution (business interests), not the amount of the contribution.

The Eighth Circuit specifically followed the Supreme Court decisions, and the Petitioners are in error in asserting that they departed from *Buckley* in their analysis.

(f) The Eighth Circuit correctly followed Cal-Med

Petitioners complain that the Eighth Circuit did not follow *Cal-Med* when it found unconstitutionally discriminatory the provision in Act I permitting a Small Donor Political Action Committee to give as much as $2,500 to a candidate in contrast to limiting an Approved PAC to $100 and $300 per election per candidate[6] and in its finding that a $200 annual contribution limit to an Approved PAC violates the First Amendment.

To the contrary, the Eighth Circuit specifically found that the Plaintiffs below met the requirements set forth in *Cal-Med*, that they are burdened to a greater extent by this provision than Small Donor PACs are, and rejected the argument that just because a Small Donor PAC raised money in contributions of $25 or less the discrimination was allowable. That argument focuses on the source of the funds given to a PAC rather than on the entity from which the candidate receives the funds. The Court recognized the possibility that a Small Donor PAC itself could seek to control a given candidate and that a $2,500 contribution would be even more likely to exacerbate this difficulty than a $1,000 contribution from other contributors. The Court stated, "If any contribution is likely to give rise to a reason-

[6]The Eighth Circuit's holding returns these limits to $1,000.

able perception of undue influence or corruption, it would be one from an entity permitted to contribute two-and-a-half times the amount that most others are allowed to contribute." This certainly supported the finding that the Small Donor PAC provision is not narrowly tailored to serve the compelling governmental interest of combating the reality or the perception of undue influence.

The analysis of the $200 annual contribution limit to an Approved PAC properly followed *Cal-Med.*[7] The Court reasoned that the limit was not narrowly tailored to serve a compelling state interest because the limit is so low as to be different in kind from the limit approved in *Buckley*. The limit is only 8% of the *Buckley* limit in 1998 dollars, and 5%, before adjustment for inflation, of the $5,000 limit approved in *Cal-Med* in 1981.

C. THE EIGHTH CIRCUIT PROPERLY REJECTED PETITIONERS' ASSERTION THAT ADDITIONAL COMPELLING STATE INTERESTS WERE IDENTIFIED SUFFICIENT TO LIMIT FIRST AMENDMENT RIGHTS

Finally, we get to the heart and soul of the Petitioners' argument, i.e., *Buckley* should be revisited in order to identify another compelling interest justifying infringement of First Amendment rights, i.e., leveling the playing field.

Act I was not campaign finance reform, narrowly tailored to correct a problem and address a compelling state interest. It was an attempt to change the electoral process by taking away First and Fourteenth Amendment rights of some citi-

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[7] The $200 limit was part of a 1990 Initiated Act, which also lowered the contribution limit for candidates from $1,500 as enacted by the legislature to $1,000.

zens in order to grant large membership groups enhanced rights with the goal of leveling the playing field. *Buckley, supra*, rejects leveling the playing field as a compelling state interest. Petitioners ask this Court to change its prior rulings as to the sanctity of the First and Fourteenth Amendments and declare that the mere possible future inclusion of people not presently involved in the electoral process overrides the rights of individuals presently involved in the electoral process. Petitioners request that this Court establish this to be a compelling state interest. However, even if the Court recognized the possible inclusion of a greater portion of citizens in the electoral process to be a compelling state interest sufficient to allow curtailment of the rights of participation of other citizens, there was insufficient evidence at trial to establish that Act I would have that effect.

The contribution limit in Arkansas before Initiated Act I was $1,000. Act I gave Small Donor Political Action Committees the right to contribute $2,500 to a candidate. Act I reduced the $1,000 limit on all other persons or PACs to $300 and $100. The purpose of the Act was patently to change the direction and grant a favored status to large membership groups at the cost of reducing others' First Amendment rights. In order for this Court to reverse the Eighth Circuit, this Court would have to greatly modify its position established in *Buckley*.

The "wealth primary" argument is equally deficient. There is no evidence in the record to support a finding that prior Arkansas contribution limits denied any person access to the ballot as either a candidate or voter. In fact, the evidence reflected that ACORN members had run successfully for office. Furthermore, the tax credit and authority to establish a Small Donor PAC were not challenged and are still the law. If those provisions enhance candidate and voter participation, the goal of the proponents will be met.

Petitioners have attempted to establish that a state of confusion exists as to the interpretation of *Buckley* by excerpting, out of context, certain quotations and findings from various cases involving First and Fourteenth Amendment rights. Each cited is readily distinguished from the case at hand. The only thread which runs constantly through all of these cases is an adherence to the principles set forth in *Buckley*. In none of the cases relied upon by the petitioners are the facts remotely similar to those in the case at hand.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990); *Colorado Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996); *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *First National Bank of Boston v. Belloti*, 435 U.S. 765 (1978) are all cases involving limits on campaign expenditures. There is no question involving expenditure limits in the case at hand.

Burdick v. Takushi, 504 U.S. 428 (1992) concerned a state ban on write-in votes.

CSC v. Letter Carriers, 413 U.S. 548 (1973) and *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), were cases involving the First Amendment rights of government employees.

Timmons v. Twin Cities Area New Party, supra, was concerned with a state ban on fusion or unwanted association on the ballot.

Vannetta v. Keisling, 899 F.Supp. 488 (D. Ore. 1995) affirmed No 95-35998, 1988 WL 461920 (9th Cir. Aug. 11, 1998) struck down a state ban on out-of-state contributions.

California ProLife Council PAC v. Scully, 989 F.Supp. 1282 (E.D. Cal. 1998); and *Federal Election Commission v. National Conservative Political Action Committee, supra*, involved public finance of election campaigns.

In all cases cited involving contribution limits, either the limits were found to be unconstitutional or limits were approved which were in excess of the Arkansas $1,000 limit. *Buckley* when applicable, has been faithfully followed.

CONCLUSION

Act I was a misconceived idea based on the false assumption that there is something inherently wrong with meaningful participation by citizens in the political process by making campaign contributions to those they support. Political campaigns have become more expensive over the years, but there is still a need to get the message out. It takes money to get the message out and run a campaign. Drastic low contribution limits are a form of spending limits because many people do not make political contributions. Since 1976 *Buckley* has guided legislatures, citizens, and courts in their analysis of campaign finance reform. In the instant case,the *Buckley* principles were followed to the letter. Act I was found to violate the First and Fourteenth Amendment rights of the Respondents. In so finding, no new principles were established, just the ones identified in *Buckley*. There is no conflict between the circuits and no important issues that need to be addressed by this Court. Even if the Court was inclined to review a campaign finance case, this is not the right case. This case does not include many issues that would be part of a comprehensive campaign finance case and does not seek to go beyond the principles announced in *Buckley*.

None of the considerations governing review on certiorari identified in Rule 10 of the Rules of the Supreme

Court of the United States are present in this case.

For the reasons set forth in this Brief, the Respondents respectfully request that the Court deny both Petitions for Writs of Certiorari.

Respectfully submitted,

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